Central Law Journal.

ST. LOUIS, MO., MAY 5, 1899.

The case of Atlantic City R. Co. v. Godin, recently decided by the Court of Errors and Appeals of New Jersey, involving the theory upon which the existence of the marriage relation depends, is interestingly reviewed by Mr. E. Q. Keasbey in a late issue of the *New Jersey Law Journal*. The question there arose as to the efficacy of what is known as a common law marriage, the court adopting the theory of contract, and declared that it was well settled in this country that no more is necessary to constitute a legal marriage than that a man shall declare in words of the present tense that a woman is his wife, and that she shall assent. No witness need be present and no particular ceremony is necessary. Mr. Keasbey called attention, by way of contrast, to the case of Voorhees v. Voorhees' Exrs., 1 Dick. Chan. 411, and to the fact that the conclusions in the two cases were different, suggesting "the inquiry whether there is not a defect in the theory that the fact of marriage depends upon contract." In the Voorhees case the logic of the chief justice, based upon that theory, was unanswerable. He said that since the woman had no suspicion that her marriage was not lawful, there could have been no new contract, and, therefore, the relation begun unlawfully remained unlawful after the impediment was removed. There was no contract except the unlawful ceremony, and, therefore, there was no marriage. Justice Garrison, dissenting, referred to the Breadalbane case (Campbell v. Campbell, L. R. 1 H. L. Cas. 182), in which marriage was regarded as an estate or existing fact evidenced by connubial conduct and repute, and in which a contrary conclusion in a similar case was reached. He insisted that the doctrine of the presumption of consent from connubial conduct was principle having its root in public policy and not a rule of evidence for determining whether the parties had actually interchanged consent. The doctrine rests, he said, on the necessity of presuming something that is not proven, and that purpose of the presumption is to establish the *status* of marriage wherever there is matrimonial conduct. The majority of the court, however, regarded the connubial conduct as merely presumptive evidence of consent, and held that there was no marriage where it appeared affirmatively that there was not an actual agreement of marriage, even though both parties, after the impediment was removed, believed that they were man and wife. In the case recently decided, the only difference was that, after the death of the lawful wife, there was some evidence of an actual contract of marriage between the man and woman, and there was the testimony of the niece of the woman saying that the man had said, "Your aunt is now my lawful wife."

In both cases the original conduct was unlawful, and in both the woman supposed it to be lawful by reason of a marriage ceremony and was ignorant of any impediment. In both the union was continued after the impediment was removed, and the parties lived together as husband and wife. The only difference was that in the one no words of contract were used afterwards, because the woman had no suspicion that they were needed; in the other there was an expression in words of the intention which was carried out in fact in the other. The court holds that in the one case there was a marriage and in the other there was illicit intercourse. The distinction is based on the theory that marriage is a contract, and that the contract must be evidenced in words, and that it is sufficient if the words be spoken between the parties themselves without a ceremony and without witnesses. Such a marriage is called a common law marriage, and the court of errors, while adopting the doctrine of the common law marriage, makes it question of evidence of an actual contract rather than a principle of public policy to be applied to certain cases in which connubial conduct should be regarded as involving the consequences and responsibilities of marriage. "The truth is," says Mr. Keasbey, "that a marriage without a ceremony, or public declaration of some sort, was unknown to the common law of England. The rule that consent alone was sufficient was a doctrine of the medieval canon law which was never adopted in England and was abrogated by the council of Trent. It was Chancellor Kent who declared in *obiter dictum* in 1809, that no formal solemnization of marriage was necessary and repealed in his commentaries

reference to the canon law as his authority, and it was strongly opposed by Chief Justice Parsons in 1810. The rule has been frequently declared in this country, but, unless it is regarded as a rule of public policy as suggested by Justice Garrison and not as a rule of evidence, it will have the dangerous consequences of giving the sanction of the law to marriages of the most secret character and depriving the State of all control of the entrance into a relation which in all civilized States is regarded as one in which the State has a peculiar interest for the protection of society. It would be most unfortunate for the community if the people generally understood that no public act was required to make a marriage lawful. It would hardly be tolerable in a civilized State if marriages generally were made by a few words said by a man to a woman in the act of yielding to the natural passions that bring them together. If this is the law now, it is high time that the legislature should provide the safeguards that now depend upon the sense of propriety which tradition has preserved in the minds of the people. It may be that it will be sufficient to extend to our own citizens the provisions of the statute requiring a license in the case of the marriage of non-residents, for the court of errors took pains to say it did not consider the effect of this statute in deciding the case above referred to."

NOTES OF IMPORTANT DECISIONS.

UNITED STATES SUPREME COURT — JURISDICTION—ERROR OF STATE COURT—CONTRACTS.—In Turner v. Board of Commissioners, 19 S. C. Rep. 464, decided by the Supreme Court of the United States, it was held that where the supreme court of a State has done nothing more than construe its own constitution and statutes, in holding that county bonds issued in aid of a railroad were void under such laws, which were in force at the time the bonds were issued, there being no subsequent legislation on the subject, the United States Supreme Court has no jurisdiction to review the correctness of the decision, on a writ of error to the State court, under the allegation that a contract has been impaired thereby. The following is from the opinion: "The supreme court of the State held that the bonds were void because the acts under which they were issued were not valid laws, not having been passed in the manner directed by the constitution. The court further held that the bonds were not authorized by the above sections of the Code, and that as they purported, by recitals on their face, to have been issued under the act of 1879, the bondholders were estopped from setting up any other authority for their issue, such as the ordinance of the constitutional convention above mentioned. 31 S. E. Rep. 481.

"The bondholders have brought the case here, claiming that by the decision below their contract has been impaired, because, as they allege, the supreme court of the State had decided before these bonds were issued that the acts under which they were issued were valid laws and authorized their issue, and that in holding the contrary after the issue of these bonds the State court had impaired the obligation of the contract, and its decision raised a federal question proper for review by this court.

"But in this case we have no power to examine the correctness of the decision of the Supreme Court of North Carolina, because, this being a writ of error to a State court, we cannot take jurisdiction under the allegation that a contract has been impaired by a decision of that court, when it appears that the State court has done nothing more than construe its own constitution and statutes existing at the time when the bonds were issued; there being no subsequent legislation touching the subject. We are therefore bound by the decision of the State court in regard to the meaning of the constitution and laws of its own State, and its decision upon such a state of facts raises no federal question. Other principles obtain when the writ of error is to a federal court.

"The difference in the jurisdiction of this court upon writs of error to a State, as distinguished from a federal court, in questions claimed to rise out of the contract clause of the constitution is set forth in the opinion of the court in Land Co. v. Laidley, 159 U. S. 103, 16 Sup. Ct. Rep. 80; and from the opinion in that case the following extract is taken (page 111, 159 U. S., and page 82, 16 Sup. Ct. Rep.):

"'The distinction, as to the authority of this court, between writs of error to a court of the United States and writs of error to the highest court of a State, is well illustrated by two of the earliest cases relating to municipal bonds, in both of which the opinion was delivered by Mr. Justice Swayne, and in each of which the question presented was whether the constitution of the State of Iowa permitted the legislature to authorize municipal corporations to issue bonds in aid of the construction of a railroad. The supreme court of the State, by decisions made before the bonds in question were issued, had held that it did, but, by decisions made after they had been issued, held that it did not. A judgment of the district court of the United States for the district of Iowa, following the later decisions of the State court, was reviewed on the merits, and reversed, by this court, for misconstruction of the constitution of Iowa. Gelpcke v. City of Dubuque, 1 Wall. 175, 206. But a writ of error to review one of those

decisions of the Supreme Court of Iowa was dismissed for want of jurisdiction, because, admitting the constitution of the State to be a law of the State, within the meaning of the provision of the constitution of the United States forbidding a State to pass any law impairing the obligation of contracts, the only question was of its construction by the State court. Railroad Co. v. McClure, 10 Wall. 511, 515.'

"An example of the jurisdiction exercised by this court when reviewing a decision of a federal court with regard to the same contract clause is found in the same volume. Folsom v. Township Ninety-Six, 159 U. S. 611, 625, 16 Sup. Ct. Rep. 174.

"This case is governed by the principles laid down in Land Co. v. Laidley, *supra*, and the writ of error must therefore be dismissed."

EXTRADITION—INTERSTATE—FEDERAL COURTS—HABEAS CORPUS.—The decision of the United States Circuit Court of Appeals, Fourth Circuit, in Eaton v. State of West Virginia, 91 Fed. Rep. 760, passes upon a somewhat unusual question of the law of interstate rendition. It appeared that the defendant had been tried for the crime of arson in the State of West Virginia, after having been surrendered to the agent of the governor of State by the authorities of the State of Illinois. The defendant claimed that he was a citizen and resident of the State of Illinois. The circuit court of appeals intimates that the action of the governor of a State in issuing a warrant for the surrender of an alleged fugitive from justice to the authorities of another State, upon requisition, is regular, although merely presumptive proof was offered that the person named was in fact a fugitive from justice. In Eaton v. State of West Virginia, *supra*, it appeared that, although the defendant originally might have contested the right to extradite him from Illinois to West Virginia, he had practically waived the point by not raising and insisting upon it in some court, State or federal, having local jurisdiction in Illinois. The *New York Law Journal* says, in a review of this case: "The ordinary policy of the federal courts in criminal cases is to permit a prosecution in a State court to proceed to judgment, the defendant being relegated to his right of raising any question of infringement of federal privileges and immunities upon writ of error from the Supreme Court of the United States to review the determination of the supreme court of the State affirming his conviction. The Supreme Court of the United States has in several cases asserted the right of the federal courts to interfere with the administration of State law, if any peculiar necessity for such interference is shown to exist. But where no such exigency appears, the Supreme Court of the United States will suffer the effectuation of the judicial policy of a State without interlocutory intervention.

"It is well settled that, even in cases of kidnaping, the jurisdiction for trial of a State, over persons charged with having broken its laws, is to be recognized. Kerr v. People, 119 U. S. 436; Mahon v. Justice, 127 U. S. 700. Such decisions emphasize the duty of careful and conscientious administration of the law of interstate rendition by the courts of a State upon which a demand is made by another State for the surrender of an alleged fugitive from justice. The substantial responsibility is lodged by law in the governor and courts of the State in which the alleged fugitive has taken refuge. It seems that if an alleged fugitive from justice has once been surrendered to the agent of a demanding State, practically he cannot avail himself of illegality in the demand. Also, it has been conclusively determined by the Supreme Court of the United States that a person surrendered upon a certain charge may be tried in the demanding State for a different offense. Lascelles v. Georgia, 148 U. S. 537.

"Where a defendant has already been convicted of an offense against the laws of a State, his surrender will not be ordered under federal *habeas corpus*, unless under exceptional circumstances. This is the purport of the decision in Eaton v. State of West Virginia, above referred to. It appeared that the defendant was present in the State court and made his full defense on the merits to the trial of the offense of arson charged against him. Of course the defense of non-presence at the time of the commission of a crime may be raised, either as a defense of alibi upon the trial, or, under federal law, to the surrender of the alleged criminal to a foreign State. Where the right to a release from custody is urged before trial, the ordinary presumptions in favor of the innocence of a prisoner undoubtedly should prevail. If, however, an interstate prisoner has been convicted in a court of competent jurisdiction, it seems only proper that the discretionary jurisdiction of the federal courts on *habeas corpus* should not be exercised except under extraordinary conditions. As to a convicted defendant, it would seem only proper to leave him to his remedy by appeal to the supreme court of the State, and then, if aggrieved, to the Supreme Court of the United States."

CARRIERS OF PASSENGERS—INJURY TO PASSENGER—NEGLIGENCE.—In Walker v. Green, 56 Pac. Rep. 477, decided by the Supreme Court of Kansas, it was held that a passenger on a freight train, who voluntarily and unnecessarily rides in a freight car containing a horse and household goods, which he is shipping over the line of road, instead of riding in the caboose attached to the train, which is provided for the accommodation of passengers, and who is injured by the negligent handling of the car, will be deemed guilty of contributory negligence; and the permission of the trainmen to ride in the freight car will constitute no excuse for his act. The court said in part: "Freight cars are not designed for passenger travel, nor are they used for such, except as the exigencies of particular cases require. A railroad

company discharges its full duty to the public when it provides trains composed of passenger coaches, and cabooses to its freight trains for the convenience of such passengers as have occasion to accompany their live stock or other property. It is not required, in the management of its freight trains, in making them up, in coupling its freight cars together, and in switching them about in its yards, to exercise that degree of care which is necessary in handling its passenger coaches and trains, for the obvious reason that no passengers are supposed to be in its freight cars. To hold railroad companies, as to passengers voluntarily and unnecessarily riding in their freight cars, to the same degree of care required of them as to passengers in their regular coaches or in their cabooses, would be preposterous. Carefulness is required of railroad companies, as of individuals, with relation only to that which may be injured or destroyed by the lack of it, and with relation to their knowledge of what has been committed to their care. With relation to passengers whom they have undertaken to transport, the highest degree of diligence which human skill and foresight can exercise is required of them. With relation to freight they have undertaken to transport, a less degree of care and prudence is exacted. For example, the receivers may be liable for the negligent handling of the cars in the yards at Newton, which resulted in damage to the goods of the defendant in error; but they are not liable to him for the injuries he received, because he voluntarily exposed himself to the hazards of riding in a freight car. It is no sufficient answer to say that the trainmen knew the defendant in error was in the freight car. In all probability, they were unaware that he was in fact in it; nor were they bound by the usual course of their duty or their observation to know that he or other passengers would be liable to ride in such unusual place, but, had they known him to be in the car, the case would be nowise different. The increased dangers of riding in such car were as well known to him as to the trainmen; and their knowledge that he was exposing himself to the increased perils of such kind of passage, or their permission to him to do so, constitutes no justification for his act. He was of mature years and discretion, and needed no one to warn him against the hazards he was taking. He, as well as they, was charged with notice that freight cars are not fit and safe vehicles for travel. The principles applicable to this case have been heretofore declared by this court in Railroad Co. v. Lindley, 42 Kan. 714, 22 Pac. Rep. 703. In that case it appeared that a live stock shipper was directed by the conductor to go upon the top of the train hauling his stock, so as to assist in watering it. He did so, and was injured by the negligent act of the engineer in violently bumping together detached portions of the train. It was ruled that riding upon the top of the cars was negligence upon his part, and also that the direction or request of the train conductor to do so constituted no excuse for his assumption of the risk. In the opinion by Chief Justice Horton, many of the cases elucidating the rules in question are cited and quoted from. No cases involving a state of facts entirely like those under consideration have been called to our attention, but many of an analogous character are cited in Ray, Neg. Imp. Dut., sec. 123. The rule collectible out of these cases fully supports the decision made in this case and in that of Lindley, *supra*. It is true that the portion of the written contract of shipment made by the defendant in error recites that he was 'permitted to go on, over, and about the cars in the train in which said stock is carried.' This, however, was not a permission to ride throughout the entire journey on other parts of the train than the caboose; but it was, as the language reads, a permission to go on, over and about the train, and was, of course, designed to enable him to make such inspection *en route* of his horse and other property as might be thought necessary to properly care for it. There was no occasion for him to ride continually in the car with his horse and household goods in order to care for them, nor does the contract of shipment presuppose a necessity for doing so, and therefore confer upon him a corresponding right."

PREFERRED DEMANDS AGAINST INSOLVENT ESTATES.

There has been developed recently, what is termed a modern doctrine of equity, adopted by several courts of review, viz.: that if an agent or trustee wrongfully convert to his own use money held by him in a fiduciary capacity, and afterward fails, his insolvent estate will be presumed to contain the converted fund for which the *cestui que trust* may have a trust or preferential lien on the entire assets. It is predicated variously on the propositions: (1) that the wrongful conversion and use of the fund constitutes a confusion of property; (2) that the conversion itself is evidence of, or will be presumed a *pro tanto* augmentation of the general mass of assets; (3) that if disbursed in the payment of debts, or for personal advantage, the agent will be presumed to have used his own money, and the trust money to lodge in the general assets. Generally the cases involved concern the distribution of the assets of insolvent banks failing with little or no cash on hand, so far as the opinions disclose, and, without performing fiduciary offices assumed by them as to moneys received in trust, for the repayment of which, as well as their general indebtedness, the assets are charged. The doctrine, sub-

stantially, was first advanced by the Supreme Court of Kansas in 1883, in Peak v. Ellicott, and has since been adopted in several States,[1] some of which subsequently modified, distinguished or overruled it. New York[2] and Wisconsin[3] have abandoned it altogether. In Sherwood v. Bank[4] the Michigan court returns to the general rule and ignores the doctrinal opinion in Carley v. Graves, cited, not even alluding to it. The Kansas court, in a late case,[5] construed the doctrine as imposing on the insolvent estate the burden of proving that no part of it contains any of the trust fund, else the trust may be charged upon the whole assets, upon what principle does not appear. In a late Missouri case,[6] the trust money was blended with that of the trustee in his bank account which was empty when he failed. No tracing of the proceeds of the account was attempted. The court recognized the general rule and collated the authorities supporting it, but, notwithstanding, adhered to the doctrinal precedents, reaffirming the views entertained in common by them, and quoting Stoller v. Coats with approval "that while it may be impossible to follow a trust fund in its diverted use, it is always possible to make it a charge upon the estate or assets, to the increase or benefit of which it has been appropriated, and, the general assets of the bank having received the benefit of the unlawful conversion, there is nothing inequitable in charging them with the amount of the converted fund as a preferred demand." The doctrine as stated is still maintained in Kansas, Missouri, Iowa and New Jersey, but was recently disclaimed in Nebraska.[7] It has been cited with approval by the Supreme Courts of Colorado[8] and South Dakota,[9] but its adoption by them does not clearly appear. Although maintained by such very able and distinguished authorities, it is no less a violation of established equitable principles of which it is professed to be a progression. The rule of equity as determined by the weight of modern authority is, substantially, that a beneficiary may follow and reclaim trust money in the hands of a trustee or his representatives, so long as it may be identified, or, have a charge therefor on a distinguishable sum of money with which it is proven commingled, or, if it has passed current, he may follow and reclaim, or have a charge therefor upon any form of property into which it has been converted, so long as it may be traced, and the rights of innocent holders have not intervened. The right continues whether the proceeds be of greater or less value, whether it consists of tangible property, or a credit, as a bank account balance, or whether the purchase or use be rightful or wrongful.[10] The subject is wholly within the province of equity, and is not for determination by the common law doctrine of confusion of goods. But if the latter could be involved, still there could be a confusion

[1] Peak v. Ellicott, 30 Kan. 156; Meyers v. Board, 51 Kan. 87; Hubbard v. Irrigating Co., 53 Kan. 637; Ryan v. Phillips, 3 Kan. App. 704; Hazeltine v. McAfee, 5 Kan. App. 119; Harrison v. Smith, 83 Mo. 210; Stoller v. Coates, 88 Mo. 514; First National Bank v. Sanford, 62 Mo. App. 283; I. X. L. Co. v. Chonreich, 65 Mo. App. 283; German Fire Ins. Co. v. Kimble, 66 Mo. App. 370; Synod v. Schoeneich (Mo.), 45 S. W. Rep. 647; Pundmann v. Schoeneich (Mo.), 45 S. W. Rep. 112. See Phillips v. Overfield, 100 Mo. 466, and Ulrici v. Broekeler, 72 Mo. App. 61; People v. City Bank, 96 N. Y. 32; People v. Bank of Danville, 39 Hun, 187; McCall v. Fraser, 40 Hun, 111; McLeod v. Evans, 66 Wis. 401; Francis v. Evans, 69 Wis. 115; Bowers v. Evans, 71 Wis. 133; Boyer v. King, 80 Iowa, 497; Davenport Plow Co. v. Lamp, 80 Iowa, 722; Eureka v. Bank, 88 Iowa, 201; Jones v. Chesebrough (Iowa), 75 N. W. Rep. 97; Anheuser Busch v. F. & M. Bank, 36 Neb. 31; State v. Bank of Wahoo, 42 Neb. 896; Capitol National Bank v. Coldwater National Bank, 49 Neb. 786; State v. Midland Bank, 52 Neb. 1; Carley v. Graves, 85 Mich. 483; Smith v. Combs, 49 N. J. E. 420.

[2] Cavin v. Gleason, 105 N. Y. 256; Holmes v. Gilman, 138 N. Y. 369; Imp. & Trad. Bank v. Peters, 123 N. Y. 272.

[3] Nontucket Silk Co. v. Flanders, 87 Wis. 237; Burnham v. Barth, 89 Wis. 362; Henry v. Martin, 88 Wis. 367; Glanella v. Momsen (Wis.), 63 N. W. Rep. 1018.

[4] 103 Mich. 109.

[5] Travelers' Ins. Co. v. Caldwell, 52 Pac. Rep. 540.

[6] Synod v. Schoeneich, 45 S. W. Rep. 647.

[7] State v. Bank of Commerce, 75 N. W. Rep. 28.

[8] First National Bank v. Hummel, 8 L. R. A. 788.

[9] Kimmel v. Dickson, 5 S. Dak. 221, 25 L. R. A. 788.

[10] Pennell v. Deffel, 4 D. M. & G. 372; Knatchbull v. Hallett, L. R. 13 Ch. Div. 696; National Bank v. Insurance Co., 104 U. S. 54; Slater v. Oriental Mills, 18 R. I. 352; Shields v. Thomas, 71 Miss. 260; Ferchen v. Arndt, 26 Oreg. 121; Little v. Chadwick, 151 Mass. 109; Bank of Florence v. U. S. S. & L. Co., 104 Ala. 297; Boone Co. Bank v. Latimer, 67 Fed. Rep. 27; Freylinghuysen v. Nugent, 36 Fed. Rep. 229; McComar v. Long, 85 Ind. 549; Windstanley v. Second National Bank, 13 Ind. App. 544; Continental National Bank v. Weems, 69 Tex. 489; N. D. Elevator Co. v. Clark, 3 N. Dak. 26; Engler v. Offcut, 70 Md. 78; F. & M. Bank v. King, 57 Pa. St. 202; *In re* Lebanon, etc. Bank, 166 Pa St. 622; Steamboat Co. v. Locks, 73 Me. 370; Imp. & Trad. Bank v. Peters, 123 N. Y. 272; Nontucket Silk Co. v. Flanders, 87 Wis. 237; Wetherall v. O'Brien, 140 Ill. 145; Illinois, etc. Bank v. First National Bank, 15 Fed. Rep. 858; Prindall v. Trevor, 50 Ark. 249; Bright v. King (Ky.), 45 S. W. Rep. 508; State v. Foster (Wyo.), 38 Pac. Rep. 926; Calhoun v. Bank (S. Car.), 20 S. E. Rep. 153.

of goods only with its species indistinguishable from it,[11] as wheat with wheat, or, if we may say, money with money, but not wheat with lumber, or money with bonds, chattels and lands—general assets—because distinguishable from the other. Confusion argues indistinguishability, but not conversely. If money is indistinguishable in a box of jewels or an insolvent's assets, obviously converted trust money cannot be in the box or in the assets. No theory of mingling, confusion or augmentation, no presumption can change the fact. If A wrongfully mingle B's money with his own, B may have a charge therefor upon the commingled fund, not by the doctrine of confusion of goods, but by the rule of equity the application of which is invoked by proof tracing the converted money. If, however, A uses the whole so that none of the blended moneys remain, B's right of property, which is the foundation of his claim, does not extend to A's other properties or even his money not so intermingled. If B is able to trace his money into particular items of property obtained in exchange therefor by A, he would have an equitable charge therefor on such items to their extent if he did not choose to take them; but if B is unable to trace his money into specific property of A, his right of property fails because nothing remains to be the subject of a trust. A, solvent, is then answerable civilly only as for a debt for the payment of which his property may be subjected by ordinary process, the *cestui que trust's* remedy in such case being no more effective than that of a general creditor. Shall then B acquire by A's insolvency a right to charge property he did not possess as against A solvent? Equity will not multiply the misfortunes of creditors by establishing a charge upon all the assets in their hands which it would deny against even a moiety of them in the hands of the wrongdoer.

Augmentation, as the term is used, can have no application to the general mass of assets of an insolvent estate. The presence of an identified item of trust property in miscellaneous assets is no augmentation of the assets by the item, or by the converted trust money, the value of which they may not contain. The beneficiary's right to recover is not based on any theory of augmentation, but on the rule of equity grounded in the rights of property. But the term, as used, imports a conclusion which rests on false premises, thus: the trust money was exchanged for a component part of the estate, therefore that part of the estate contains the fund, therefore the whole estate contains it, therefore its subtraction from the whole is not a diminution of the assets; or, the trust money was used in the course of business, therefore it was used for the benefit of the estate. therefore the estate received its value, therefore it contains its value, etc. If a tenement house be purchased with the converted fund, the lien on the whole estate insures it to be salable for the amount thereof. If it is destroyed by fire it is alike insured by the greater lien. From this reasoning we dissent. The theory, as well as presumptions which dispense with proof tracing the trust money into the specific items of property sought to be subjected to the trust charge, is, in effect, a legal fiction which accomplishes the defeat of the rule. If, instead of money, the subject of the trust be wheat or cattle, and the insolvent's granary be empty, or his field unpastured, it has not been contended the trust, or its value, may be charged upon the entire estate of the unfaithful agent or trustee even when insolvent, nor upon a greater part thereof than may be identified as the proceeds of the wheat or the proceeds of the cattle, unless the proceeds be money, which, as the beneficiaries, it follows the doctrine would charge upon the whole estate without further identification. The accident of form would then seem to define the right and determine the remedy. Another modern doctrine will have to be devised by which equity may vary the rights and liabilities pertaining to the trust relation, with the varied forms of trust property. If a trustee's miscellaneous properties are so absorbent that converted trust money will be presumed to permeate through their every part, why should not the doctrine include other forms of trust property no less sacred than money?

It is held the use of the trust money by the wrongdoer, even in the payment of his debts, is beneficial to the estate —a *pro tanto* augmentation of it. If A owns unincumbered property worth $10,000, and wrongfully converts $5,000, he may hold in trust for B, with which he pays a debt of

[11] 2 Cooleys Blackstone, 405; Goff v. Brainerd, 58 Vt. 468; Chandler v. DeGraff, 25 Minn. 88.

the same amount to his only creditor, C, does B thereby acquire any right in, or charge upon A's property under any rule or theory? But carrying the illustration further: D and E are also creditors of A for $5,000 each, and A makes an assignment. Will equity require the interference of creditors to confer on B the right to charge property he otherwise could not possess, and punish D and E for their timely aid by doubling their loss? If trust fund charges may be impressed upon the entire assets of an insolvent, instead of upon a distinguishable mass of money with which the fund is proven commingled, or upon specific property for which it is proven exchanged, then it does not require the interference of creditors to give a *cestui que trust* a charge upon all the property of an embezzling agent or trustee, regardless of its quantity or value, regardless of its ownership by the wrongdoer prior to the conversion, and regardless of the converted fund being traced into any particular item. If, as these authorities hold, the creditors take the estate charged with the trust, then the trust relationship has ceased to be personal and fiduciary, and a trustee, in accepting a trust, thereby imposes a lien upon all his property in favor of the beneficiary—a lien more sweeping and effectual than any mortgage, and enforceable by the beneficiary on default of performance. Nor in reason can the beneficiary's remedy be different, if the subject of the trust be property other than money. The law does not support the exercise of such power by the courts. When the trust money has passed current it is beyond the domain of equity. The chancellor's grasp is then limited to that which it is ascertained to have purchased. He may subject it to the equitable charge or ownership of the beneficiary, but he may no longer award the trust money which is not answerable to the decree, although, having jurisdiction of the unfaithful trustee, he may deal with him *in personam*. If the use of the trust money, as in purchase, be rightful and authorized by the beneficiary, his recovery may not extend beyond the new form of property identified, nor is his remedy *in rem* superior if the use and purchase be wrongful and unauthorized. Knatchbull v. Hallett[12] is a leading English case cited with approval generally by American courts, including some of those maintaining the subject doctrine. Hallett wrongfully converted £2,145, which he deposited to the credit of his bank account, and three months later died, when there was a balance of £3,029 to his credit. Omitting deposits subsequent to that of the converted funds, and subtracting all subsequent checks, there would have been a balance of £1,708 at the time of his death. The *cestui que trust* recovered so much of her fund. The court declined to be bound by the "no earmark" doctrine, and followed the fund commingled in the bank account, charging it upon the bank balance to the extent of £1,708, the amount traced in the view of the court as presented by the case. It will be observed the estate was not charged, neither was the full amount of the converted fund charged upon the bank balance as it stood at the time of Hallett's death. As illustrating its position: "If a man has £1,000 of his own in a box on one side, and £1,000 of trust property in the same box on the other side, and then takes out £500 and applies it to his own purposes, the court will not allow him to say that money was taken from the trust fund. The trust must have its £1,000 so long as a sufficient sum remains in the box. The reasoning of the opinion is clearly against the extension of the trust charge to other unidentified property of the estate, if we suppose the box or Hallett's bank account to have been empty. The court held that if an agent holding money in a fiduciary capacity mixes it with his own and draws out of the mixed fund, he will be presumed to draw out his own money first. The necessary inference is, the trust money will be presumed to lodge in so much of the mixed fund as remains, but it does not follow it will be presumed to lodge in the different miscellaneous assets of the wrongdoer after the fund is gone. The indiscriminate synonomous use of the terms "funds" and "assets" by the courts adopting the subject doctrine would seem to facilitate their departure. The substitution of general assets for particular funds as subject to the application of the rule, is, as well, logically faulty. Central National Bank v. Conn. Mutual Life Ins. Co.,[13] is a leading American case also cited by these courts. In this case defendant's agent Dillon deposited its premium collec-

[12] L. R. 13 Ch. Div. 696.

[13] 104 U. S. 54.

tions with plaintiff bank in his own name as "agent," in which account he also deposited his own money, checking against the account for his private use. The plaintiff endeavored to enforce a banker's lien against the deposit balance for Dillon's individual indebtedness to it. It was held the plaintiff had notice of the character of the deposit, and, as aptly expressed in the syllabus, that "as long as trust property can be traced and followed, the property into which it has been converted remains subject to the trust, and, if a man mixes trust funds with his own, the whole (commingled funds, not the whole assets of the wrongdoer) will be treated as trust property, except so far as he may be able to distinguish what is his. This doctrine applies to every case of a trust relation, and as well to moneys deposited in bank, and to the debt thereby created, as to every other description of property." The parentheses are ours.

Curiously enough the Nebraska court, in a late case,[14] disclaims ever having sanctioned the doctrine, and, in reviewing its opinions supporting it, refers to the files to show that the cash on hand at the times of the several failures exceeded the amounts of the trust charges, evidently choosing now to let its earlier determinations rest on other grounds than those disclosed in the opinions. As trusts were charged upon general assets, then, if cash funds existed, the extension of the charge to the entire assets was rightful—a conclusion necessarily implied in the disclaimer, and which does not accord with the views of that distinguished court in the learned opinion before us. The mere presence of money in the safe of an insolvent bank would not seem, under the rule, to dispense with proof tracing and continuing the trust money in the mass of its kind. On this subject, however, the authorities are not in harmony, and its discussion suggests another article.

The doctrine by which a charge for converted trust money, even if actually traced into a part, may be fastened on the whole assets of an insolvent estate, instead of being a modern doctrine and a growth of equity, would seem to have its source in a hasty, inaccurate, and possibly incomplete opinion, which, serving for precedent, multiplied precedents to unsettle the law and defeat the rule. Whatever superior claims a *cestui que trust* may have to commend his cause to a court of equity, it would seem the rule more recently modified as to permit him to trace his money into other money or a bank account, if indeed the modification has not always been a part of the rule, should afford him ample justice—as ample as may be without prejudice to the rights of intervening creditors.

CLINTON L. CALDWELL.

St. Louis, Mo.

[14] State v. Bank of Commerce, 75 N. W. Rep. 28.

PRINCIPAL AND SURETY — EXTENSION OF TIME—RELEASE OF SURETY.

OLMSTEAD v. LATIMER.

Court of Appeals of New York, February 28, 1899.

An extension of time for the payment of a bond and mortgage for no consideration except an agreement to pay at the expiration of the time is void for want of consideration, and therefore will not discharge sureties on such bond and mortgage.

PARKER, C. J. (after stating the facts): The defendants Latimer, as heirs at law of the mortgagee, were respectively liable, under section 1843 of the Code, for the debts of the said mortgagee decedent to the extent of their interests in the real property that descended to them from him. The premises covered by the mortgage were primarily liable to pay the mortgage debt. As there was no personal estate, the defendants were secondarily liable, and they were properly made parties in the action of foreclosure by virtue of section 1627 of the Code, which provides that "any person who is liable to the plaintiff for the payment of the debt secured by the mortgage, may be made a defendant in the action; and if he has appeared, or has been personally served with the summons, the final judgment may award payment by him" of any deficiency. The judgment, as it comes to us, decrees that the defendant Frederick B. Latimer shall pay one-quarter of the deficiency, but it has been held that the effect of the conveyance of the premises to the defendant Frederick by his brothers in the years 1888 and 1889, together with the fact that he informed the plaintiff of such conveyance, and thereafter made an agreement to extend the time of payment of the bond and mortgage, had the legal effect of making Frederick, the principal debtor, and his brothers, sureties, and hence that the effect of the agreement, extending the time of payment operated to release the sureties from all liability to the plaintiff on account of the indebtedness evidenced by the bond. Assuming, but not deciding, that the effect of the conveyance, and that which subsequently happened, was to change the obligation of the defendants other than Frederick towards the plaintiff from that of principals to that of sureties, we

come to the question whether the agreement to extend the time of payment was invalid for want of consideration.

There are several decisions in this court in which the question has been considered, and they are in harmony with one another. In Kellogg v. Olmstead, 25 N. Y. 189, the action was on a promissory note by the transferee of the payee. The answer alleged that, after the note became due, it was mutually agreed between the holder thereof, the payee, and the defendants "that, in consideration that the defendants would keep the principal sum of the said note until the 1st day of April, 1857, and pay the same, with interest, on that day, he, the said payee, would extend the time of payment of the principal of said note until the 1st day of April, 1857; that the said defendants then and there assented to such proposition, and then and there agreed to and with said Covil to keep said principal sum of said note until the 1st day of April, 1857, and to pay the same with interest on that day." On the trial of the action the referee excluded evidence offered by the defendants to establish the defense so specially set up, and exceptions were taken thereto that presented the question to this court. It was held that an agreement by a creditor to postpone payment of a debt until a future day certain, without other or further consideration than the agreement of the debtor to pay the debt, with interest, is void for want of consideration; the court citing, in support of its position, Miller v. Holbrook, 1 Wend. 317; Gibson v. Renne, 19 Wend. 390; Pabodie v. King, 12 Johns. 426; Reynolds v. Ward, 5 Wend. 501; Fulton v. Matthews, 15 Johns. 433. A dissenting opinion was written by Judge Davies, who, two or three years later, wrote the principal opinion in Halliday v. Hart, 30 N. Y. 474. In that case the action was brought to recover against the maker and two indorsers on a promissory note. The indorsers defended on the ground that the plaintiff had, for a valuable consideration, in writing, extended the time of payment for a period of some months, and claimed that the effect of such extension was to discharge the sureties from liability. The authorities bearing upon the question were very carefully considered, and the court decided that a partial payment by the maker on account of an overdue note is not a valid consideration for a promise of forbearance as to the residue, so as to discharge the indorsers. A concurring opinion was written by Judge Hogeboom, in which he says: "The sureties were not discharged. There was no valid agreement for the extension of the time of payment. There was no payment of any sum which the party paying was not obliged to pay. The performance of an unqualified legal obligation by payment of part of a sum due upon a note is not a valid consideration for the extension of payment of the remainder."

The next case in this court was Lowman v. Yates, 37 N. Y. 601. The action was upon a bond given by Ely as principal, with Parmenter as surety, conditioned that Ely should, before a given date, take up and deliver to the plaintiff two mortgages, executed by him, amounting to $10,000. The action was brought against the personal representatives of the surety, the principal having died. The defense relied upon was that the plaintiff, without the surety's consent, took from the principal four negotiable promissory notes, to be applied upon the bond for the payment in the aggregate of about $7,000 of principal, 3, 3½, 4 and 5 years after date, and indorsed the same upon the bond, thereby extending the time of payment, and discharging the defendant as surety. The court, recognizing the principle that a creditor by a valid and binding agreement between himself and the principal debtor, extending the time of payment without the consent of the surety, thereby discharges the latter from liability, said that, in order that an agreement shall accomplish that result, it must have a sufficient consideration, so as to prevent the prosecution of the debt by the owner, and to prevent the surety from compelling him to enforce it. It was claimed by the plaintiff that he was induced to enter into the agreement, and take notes extending the time of payment, by the fraudulent representations made by the principal debtor, and it was held that the court properly left it to the jury to determine whether the notes were imposed on the plaintiff by fraud, and, if so, that their receipt by the plaintiff under the agreement did not operate to extend the time of payment of so much of the amount of the bond as their face value represented. It was also held that the judge properly charged that, in any event, the extension of the time of payment did not discharge the surety as to the residue of the bond beyond the amount of the notes. In Parmelee v. Thompson, 45 N. Y. 58, one of the makers of a promissory note after maturity paid to the payee a sum equal to the amount due thereon, and took possession of the note. Subsequently he brought suit against another maker, who gave evidence tending to show that while the payee held the note an action was brought thereon in the supreme court, and that it was agreed between the defendants and the plaintiff therein that the suit should be discontinued, the defendant to pay the costs, and have until the ensuing December to pay the note; that the costs were paid, and the suit discontinued, after which the plaintiff became the owner of the note, and brought the action before the expiration of the time agreed upon, and the trial judge held that there was no valid agreement to extend the time of payment. The judgment was affirmed in this court, the opinion being written by Judge Allen, in which he said: "It is competent for the parties by a parol agreement to enlarge the time of performance of a simple contract. * * * But a promise to extend the time of payment, unless founded on a good consideration, is void. A payment of a part of the debt, or the interest already accrued, or a promise to pay interest for the

future, is not a sufficient consideration to support such promise," citing Miller v. Holbrook, Gibson v. Renne and Kellogg v. Olmsted, *supra*.

In Powers v. Silberstein, 108 N. Y. 169, 15 N. E. Rep. 185, the action was brought upon a promissory note made by the firm of Joy & Bowman, and indorsed by the defendant Silberstein, who alone answered, setting up as a defense that the note was indorsed by him for the accommodation of the makers, and that the time of payment was extended by an agreement, made without his consent, between the makers and the plaintiff. The plaintiff had judgment in the trial court, which was affirmed at the general term, but reversed in this court on the ground that there was evidence tending to establish that the plaintiff, after the maturity of the note, agreed with the makers, Joy & Bowman, to forbear the collection of it if they would continue plaintiff's son in their employment, and that Joy & Bowman consented, and did retain him in their service, upon this consideration. In the course of the opinion the court cited Lowman v. Yates, *supra*, upon the proposition that a mere indulgence by a creditor of the principal debtor will not discharge the surety, and that the agreement for an extension, made without the consent of the surety, must be upon a valuable consideration, such as will preclude the creditor from enforcing the debt against the principal; but argued that the plaintiff did not deny that the employment of his son was an inducement to the original loan, or that the subject of his continuing employment was referred to in his conversation with the makers of the note after maturity; and that, taken in consideration with the fact that the loan was allowed to remain standing for three years after the maturity of the note, presented a question for the jury as to whether there was an extension of the time upon a good consideration.

Our attention has not been called to any authority in this court in hostility to the position taken in the decisions we have referred to. The rule laid down by them has been followed in many cases in the trial courts, and among them may be found the comparatively recent cases of Manchester v. Van Brunt (City Ct. N. Y.), 19 N. Y. Supp. 685, and Babcock v. Kuntzch, 85 Hun, 615, 32 N. Y. Supp. 663. The reasons assigned by the learned justice who wrote for the appellate division in favor of overthrowing the doctrine of these cases, while presented with marked ability and clearness, are not at all new. They were advanced in the dissenting opinion by Judge Davies in Kellogg v. Olmsted, *supra*, the first case in which the question received attention in this court, so far as we are advised. Whether the reasoning of the prevailing or dissenting opinion seems the better, it is not profitable to inquire, for the question was settled by the decision of this court, and has by later adjudications become so firmly grounded that it may not now be questioned. The judgment should be reversed as to the defendants Henry A. and Brainard G. Latimer, and that of the special term modified by striking out the direction to the referee to pay costs to Brainard G. and Henry A. Latimer, and so further modified as to adjudge that the defendants Frederick B. Latimer, Henry A. Latimer and Brainard G. Latimer each pay to the plaintiff one-quarter of any deficiency that may arise on the sale of the mortgaged premises under said judgment, and as thus modified affirmed, with costs. All concur. Judgment accordingly.

NOTE.—When it is known to the payee that the relation of principal and surety exists between the makers of a note, an agreement, without the consent of the surety, not to sue the principal for a definite time, will release the surety. First Nat. Bank v. Skidmore (Tex. Civ. App.), 30 S. W. Rep. 564. Where the payee of a note, in extending time of payment to the maker, reserves his rights against the sureties, the latter are not discharged, though they are not notified of the fact. Boston Nat. Bank v. Jose (Wash.), 10 Wash. 185, 38 Pac. Rep. 1026. An agreement to give time to the debtor which reserves a right to sue at the request of the sureties, does not release the latter. Exchange Bldg. & Inv. Co. v. Bayless (Va.), 21 S. E. Rep. 279. A surety on a note secured by chattel mortgage is not prejudiced because, after its execution by him, there was indorsed thereon the stipulation, "With privilege of three months' extension, if security remains satisfactory." Kittridge v. Stegmeier (Wash.), 39 Pac. Rep. 242. Taking a mortgage as additional collateral security for a debt already secured by bond and mortgage does not extend the time of payment of the original debt so as to release the surety of the debtor. Mack v. Anderson (Sup.), 33 N. Y. S. 208. Where two partners of a firm since dissolved both signed a note, the time of payment of which was subsequently extended by the payee, with the consent of both makers, the fact that the payee extends the time of payment to one of them, knowing that their partnership had been dissolved, and that this one had assumed the payment of the note, leaving the other in the position of surety, as between them, discharges that other from liability. Walter A. Wood Mowing & Reaping Mach. Co. v. Oliver (Mich.), 61 N. W. Rep. 507. Indorsements upon a note payable in six months, showing that interest had been paid annually on the note for several years, are not proof that an extension had been granted so as to discharge a surety. Dyer v. Shenkberg (Iowa), 61 N. W. Rep. 403. An extension of time for the payment of a debt will not discharge a surety unless it is for a definite time and on a sufficient consideration; a mere forbearance to sue not being sufficient. Watts v. Gantt (Neb.), 61 N. W. Rep. 104, 42 Neb. 869. The extension of the time of payment as to one only of the joint makers of a note releases the sureties. Warburton v. Ralph, 9 Wash. 537, 38 Pac. Rep. 140. A request by a surety on a note that the payee "delay pressing the collection" of it does not prevent an extension, as to the maker, of the time of payment, from releasing the surety. Warburton v. Ralph, 9 Wash. 537, 38 Pac. Rep. 140. Where the holder of a past-due note, on consideration of the payment in advance of usurious interest, extends the time of payment without the knowledge of the surety, the latter is discharged; such holder at the time of granting the extension knowing the fact of suretyship. Knight v. Hawkins, 93 Ga. 709, 20 S. E. Rep. 266. Where a note secured by a mortgage is signed by one of the makers

as an accommodation maker, and the payee, with the knowledge of the fact, extends the time for the principal obligor, the extension of time works his discharge from liability. American & General Mortg. & Inv. Corp. v. Marquam (C. C.), 62 Fed. Rep. 960. The acceptance, by the payee of a renewal note from the maker, to which the maker has forged the signatures of the sureties on the orginal note, interest thereon being paid in advance, is not an extension of time, binding on the payee, and therefore does not release the sureties. Officer v. Marshall (Tex. Civ. App.), 29 S. W. Rep. 246. A valid agreement by the mortgagee with the grantee of the mortgaged premises, to extend the time of payment, made without consent of the mortgagor, discharges the latter. Wayman v. Jones, 58 Mo. App. 313. A stipulation by the mortgagee to extend the time of payment of the mortgage note which has been assumed by a grantee of the mortgaged premises upon no other consideration than the payment by such grantee of the accrued interest is void, and does not release the mortgagor. Wayman v. Jones, 58 Mo. App. 313. An agreement, whereby a principal debtor is granted further time to pay his note will not release a surety thereon unless said agreement is supported by a valuable consideration. Benson v. Phipps (Tex. Civ. App.), 28 S. W. Rep. 359. An agreement between a creditor and the principal debtor extending the time of payment does not release the surety, where there is no consideration for the agreement. Smith v. Mason (Neb.), 63 N. W. Rep. 41. An agreement between the maker of a note and the payee that the latter will extend the time of payment, and that the former will pay interest during the time extended, is binding without additional consideration, and will release a surety who does not consent to the extension. Benson v. Phipps (Tex. Sup.), 87 Tex. 578, 29 S. W. Rep. 1061. In an action on a note by an indorsee against an indorser, the original payee, it appeared that the maker gave a mortgage to secure the note, and they conveyed the land to M, who assumed the note. Afterwards M conveyed the land to S M, who also assumed the note. Plaintiff agreed with the latter to extend the time of payment in consideration of S M paying the interest every 90 days. Held, that the agreement to extend the time of payment was supported by a good consideration, and that defendant was thereby discharged from liability. Commercial Bank of Lexington v. Wood, 56 Mo. App. 214. A purchaser of real estate, holding a bond for title, who, by a transfer of the bond, becomes in effect, a surety for the payment of the notes given for the purchase money, is not released from liability thereon by the making of a new contract between the vendor and the second purchaser extending the time of payment, when such contract provides that it shall not affect the original notes, nor operate to extend them, except at the election of the maker. Hodges v. Elyton Land Co. (Ala.), 20 South. Rep. 23. The acceptance of interest in advance from the principal on an overdue note does not necessarily operate as an extension of the time for payment, so as to release a surety. McGlassen v. Tyrrell (Ariz.), 44 Pac. Rep. 1088. An agreement, upon a valid consideration, by a creditor, without the consent of the surety, not to sue the principal debtor for a certain time, discharges the surety, but it does not have that effect unless the extension is for a definite period. Kendall v. Milligan (Ark.), 34 S. W. Rep. 78. The mere fact that the creditor takes a collateral security, maturing at a later date than the note on which the surety is liable, does not necessarily imply an extension of the time of payment. Roberson v. Blevins (Kan. Sup.), 45 Pac. Rep. 63. Where a mortgage is given by the principal to secure a past-due debt, without the knowledge or consent of the sureties, and it contains stipulations giving color to the claim of the sureties that it was the intention to tie the hands of the creditor and suspend all remedies on the note for a definite period of time, and there is oral testimony to the like effect, the question whether such an agreement to extend the time of payment was made as would release the sureties from liability should be submitted to the jury for its determination. Roberson v. Blevins (Kan.), 45 Pac. Rep. 63. Taking a renewal note and interest thereon till maturity in advance from the maker of the original note, though the latter was not marked "paid" or "surrendered," was not a taking of collateral security for the payment of the original note, but an extension of time of payment of that note, and hence discharged a surety thereon, who did not assent thereto. Schnitzler v. Fourth Nat. Bank (Kan. App.), 1 Kan. App. 674, 42 Pac. Rep. 496. Payment of interest in advance on a note is not of itself evidence of an agreement for the extension of time of payment sufficient to release a surety from liability. American Nat. Bank v. Love, 62 Mo. App. 378. Giving a chattel mortgage to secure an overdue note, the time of payment of which is by the terms of the mortgage extended for 30 days, such mortgage to remain after the overdue note is paid, as additional security for the payment of several demand notes already secured by a real estate mortgage, does not postpone payment of the demand notes for any definite time, so as to discharge the sureties therein. Fallkill Nat. Bank v. Sleight (Sup.), 37 N. Y. S. 155, 1 App. Div. 189. Where it does not appear on the face of a note, and is not known to the payee, that a joint maker is surety for the other, an extension of time granted to the principal will not release the surety. Bonnell v. Prince (Tex. Civ. App.), 32 S. W. Rep. 855. A note executed by a debtor cannot be deemed collateral security for the indebtedness, the time of payment of which it extends, so as to prevent the release of the sureties on the bond securing the debt, since such note must have been given either in lieu of the indebtedness, or entirely independent thereof. Templeman v. Texas Brewing Co. (Tex. Civ. App.), 35 S. W. Rep. 935. An agreement by a creditor to extend the time for payment of a debt on terms different from the contract creating it, without the consent of the sureties, releases the latter, notwithstanding an understanding between the debtor and creditor that such should not be the effect of the extension. Templeman v. Texas Brewing Co. (Tex. Civ. App.), 35 S. W. Rep. 935. The payment and acceptance of interest on a past-due note for a specified period beyond the date of its maturity, and the indorsement thereof on the note by the payee, are only *prima facie* evidence of a contract to extend payment, and will not discharge the surety, if it appears that no such extension was in fact agreed to by the payee. Maddox v. Lewis (Tex. Civ. App.), 34 S. W. Rep. 647. The surety on a note is not released by the mere promise of the holder, made to the principal maker, without the knowledge or consent of the surety, to give an extension of the time of payment thereof, unless such promise is founded upon a new and sufficient consideration. Eaton v. Whitmore (Kan. App.), 45 Pac. Rep. 450. An agreement to forbear suit for an indefinite time, in the absence of a consideration therefor, is not an extension of time such as to release a surety. Bonnell v. Prince (Tex. Civ. App.), 32 S. W. Rep. 855. The extension of the time of payment of a note in consideration of payment of interest in advance wa

a contract for an extension, founded on a valuable consideration, and released the surety from liability. Binnian v. Jennings (Wash.), 45 Pac. Rep. 302. A surety on a note is not discharged by an indefinite extension. Bunn v. Commercial Bank of Cedartown, 98 Ga. 647, 26 S. E. Rep. 63. The surrender of a note by the payee to the principal maker, on the execution by him of a renewal note, to which he forged the names of the same sureties, does not release the sureties from liability on the original obligation. Bowman v. Humphrey (Ky.), 37 S. W. Rep. 150. An extension of time, to release a surety, must be for a definite period, and on valuable consideration. Burris v. Davis, 67 Mo. App. 210. The extension of time of payment to discharge a surety must be for a definite time, and on a sufficient consideration. Houston v. Braden (Tex. Civ. App.), 37 S. W. Rep. 467. An agreement to extend the time on a note on the payment of interest in advance, and the execution of a new note will not release the sureties, where the new note so given was in fact a forgery. Jameson v. Officer (Civ. App.), 39 S. W. Rep. 190. A wife signing notes with her husband for his debt, and executing a trust deed of her separate land to secure the same, is a surety only, and hence the land is released by the granting of an extension of time to the husband without her consent. Angel v. Miller (Tex. Civ. App.), 39 S. W. Rep. 1092. An agreement by the holder of a note with one who has assumed payment, but who has not been accepted as a debtor, to extend payment, does not discharge a surety, though the extension is without his consent. Behrns v. Rogers (Tex. Civ. App.), 40 S. W. Rep. 419. Where the payee of a joint and several note, with knowledge of the fact that one of the makers is a surety only, after maturity of the note accepts from the principal payment of interest to a time in the future, however short, such acceptance amounts to an extension of the note, which releases the surety, unless made with his consent. Bank of British Columbia v. Jeffs, 15 Wash. 230, 46 Pac. Rep. 247. An agreement by the principal maker of a note to keep the money for another year and pay the same interest, is a sufficient consideration for the extension agreement, and will, without the consent of the surety, release him. Beuter v. Dillon, 63 Ill. App. 517. An agreement between the payee and principal on a note for its extension on payment of usurious interest being without consideration, does not release sureties. McKamy v. McNabb, 97 Tenn. 236, 36 S. W. Rep. 1091. An extension granted to the principal on a note without the consent of a surety releases the surety from liability, where the note was to bear interest during the extension, the promise to pay such interest being a sufficient consideration to make the extension binding. Woodall v. Streeter (Tex. Civ. App.), 39 S. W. Rep. 169. The taking of another surety on a note under an agreement for an extension releases a surety not a party to the agreement. Merchants' Bank v. Bussell, 16 Wash. 546, 48 Pac. Rep. 242. A valid agreement for the extension of the time of payment of a note releases a surety thereon, unless he assents to the extension, if the payee had notice that he signed as surety. Peterson v. Stege, 67 Ill. App. 147. The granting of an extension of time upon a note will not relieve from liability a surety who induced the extension. Williams v. Gooch, 73 Ill. App. 557. Where the payee and principal of an overdue note jointly execute another note due in a year, with the agreement that if the principal pays the latter note at maturity, the payee of the former will surrender it, the surety on the former is released by the extension implied from said agreement. Brannon v. Irons, 49 N. E. Rep. 469. Sureties on a note are released by a definite extension of time in consideration o interest in advance, and without their knowledge or consent. Schieber v. Traudt, 49 N. E. Rep. 605. A note for $1,000 was made by a principal and surety July 24, 1893, due after 30 days, interest from maturity. The note was indorsed, "Paid on within note $80, July 24, '94." The surety did not know of the interest payments. Held, that the burden was on the payee, in order to hold the surety, to show that principal's payment of one month's interest in advance was not in consideration of an extension of time, and therefore operated to release surety. Schieber v. Traudt, 49 N. E. Rep. 695. A surety on a note is released by extension of time payment, only where the extension is for a definite period and a valuable consideration, done without his consent, and with knowledge on the part of the payee of the suretyship. Voris v. Shotts, 50 N. E. Rep. 484. In an action on a note against a surety, evidence that the payee, on maturity of the note, accepted a payment equal to 90 days' interest in advance, and notified the parties interested that the note matured three months later, is admissible to show an extension of the note, although there was testimony that the payment was not received as interest. Hitchcock v. Frankelton, 74 N. W. Rep. 720. A stipulation in a note payable on demand, with interest, after six months, and giving the payees the "right of collecting the whole or any part of this note, at their own discretion, or of extending from time to time, by reception of interest in advance, or otherwise, the payment of the whole or any part thereof, without affecting our liability to pay the same," does not bind the sureties thereon to extensions of the time of payment by the principal and payee beyond the statutory limitations from the date of the note. Conway Sav. Bank v. Dow, 39 Atl. Rep. 975. Where the holder of a promissory note agreed with the maker thereof, for a valuable consideration, to extend the time of payment of such note for a period of 90 days if the sureties consented to such extension, held, that under such contract the sureties were not released. Kuhlman v. Leavens, 50 Pac. Rep. 171. An agreement to extend the time of payment of a promissory note, made between the maker and the holder thereof, subject to the assent of the sureties, whether the proposed extension was or was not known to the sureties, is not enforceable, and it may be ignored by the sureties or the holder of the note. Kuhlman v. Leavens, 50 Pac. Rep. 171. The principal maker of a note, after maturity thereof, and while solvent executed and delivered, for the security of the holder of that and other notes, a deed of trust of all his property subject to execution, without the knowledge or consent of the surety on the note. The trust deed was conditioned for the payment of the indebtedness recited within six months after the date of such deed, and provided that, if by default should be made in such payment on or before the end of the six months, then the trustee should proceed to execute the trust by sale of such property. Held, that no valid agreement for delay for a definite period, whereby such surety might be released, was to be necessarily implied from the terms of such deed. Watauga Bank v. Matson, 41 S. W. Rep. 1062. In an action on a note payable at a time certain, where the accommodation makers pleaded a release by reason of an extension of time granted the principal without their consent, the principal testified that at the time of the execution of the note the agent who made the loan agreed orally to extend the note one or two years; that when the note matured it was sent by the

payee to a bank for collection, and he then reminded said former agent of the agreement to extend, and he replied that it would be all right; that nothing was paid for the extension and no definite time agreed upon. The note was presented for payment to the accommodation makers about a year after its maturity. Held not sufficient to show an extension that would discharge the sureties. Wallace v. Richards, 50 Pac. Rep. 804. The giving of a note for interest less than that which would have accrued according to the face of a note is only a partial payment, and hence does not involve a definite extension of time for payment of the first note, so as to release sureties thereon. LaBelle Sav. Bank v. Taylor, 69 Mo. App. 99. An agreement made by the payee of a note with the maker, on the day it matures, but without the knowledge or consent of the surety, to extend time of payment in consideration of usurious interest for the period of extension, which is paid in advance, is valid, and discharges the surety. Niblack v. Champeny, 72 N. W. Rep. 402. Where the maker of a note, being insolvent, agreed to pay an independent debt which he owed the payee, if the latter extend the note, the fact of such insolvency did not make the consideration a valid one, so as to discharge a surety on the note. Bunker v. Taylor, 74 N. W. Rep. 450. The following indorsement placed on a note at its maturity, and signed by the payee: "November 21, 1894. Extended one year from date at the request of the makers," etc.,—is a valid contract of extension, the consideration for which is the implied promise of the makers to pay interest during the entire period of extension at the rate expressed in the note and a surety on the note is discharged thereby. Nelson v. Flagg, 18 Wash. 39, 50 Pac. Rep. 571.

BOOK REVIEWS.

AMERICAN STATE REPORTS, VOL. 63.

Each volume of this now well established series of selected reports bears evidence of its great value to the profession. The great mass of reported cases renders it almost an impossibility for the busy practitioner to give his attention to more than the leading ones, and therefore the value of this selection of cases, made by a competent editor, can be well understood. In the present volume, among the many important cases reported, is the case of State v. Hocker, decided by the Supreme Court of Florida, wherein is discussed what are public offices. A good case on the subject of wills, is People v. Hubert, decided by the Supreme Court of California. The note to this case discusses in an exhaustive way the question of insane delusions. Heller v. Chicago & Grand Trunk Ry. Co., decided by the Supreme Court of Michigan, has a note containing a review of the authorities on the respective duties of carriers and shippers of live stock. This series of reports is published by the Bancroft-Whitney Company, San Francisco, Cal.

AMERICAN DIGEST FOR 1898.

This immense volume has been in our hands for some time, and we have already made repeated and constant use of it, the result of which has been in an eminent degree satisfactory. We are glad to say that the manner of the preparation of this digest, its statement of legal principles, its division of subjects into heads and subheads, its reference to the various reporters and State reports, place it beyond any criticism, except in one particular, and in that regard the publishers have already anticipated the objection. The present volume is abnormally large, being about 1,800 pages in size. In order to place before the profession the digest of every decision of the courts, the publishers have been obliged to issue this immense volume which is too bulky for handy use. Upon this subject the publishers say: "The size of the 1897 annual makes evident the fact that, if the bulk of the digest is to increase in the future as it has in the past, it will soon be out of the question to attempt to bind it in one volume, and impracticable to use it if so bound. This increase is due directly to the natural and growing increase in judicial decisions. To omit any of the cases, is, of course, impossible. We have given subscribers the option of having their annuals bound in two volumes, if they so prefer; but a two-volume digest has disadvantages of its own, even as a large single volume has. It becomes necessary for us to reduce the bulk of the digest volumes by every legitimate means in order to save our subscribers from this dilemma in the future. We shall accordingly keep the American digest down to volumes of from 2,000 to 2,500 pages each hereafter, closing the volume when that amount of matter has accumulated, without regard to the number of months covered. This plan, preserving all the advantages of a single alphabetical arrangement in each volume, while restricting the books to size convenient for use, and accompanied by a considerable reduction in the price of the volumes, is believed to be the most satisfactory solution of a vexatious problem." This plan it would seem to us will relieve the objection heretofore mentioned. The present volume contains a digest of all the current decisions of all the American courts as reported in the National Reporter System and official reports and elsewhere, from September 1, 1897, to August 31, 1898. With the change in the size of the volumes as indicated by the publishers it would seem as though this series of digests had reached its final and full perfection. Published by West Publishing Co., St. Paul, Minn.

BOOKS RECEIVED.

General Digest, American and English, Annotated. Refers to all Reports, Official and Unofficial. Vol. VI. New Series. Rochester, N. Y.: The Lawyers' Co operative Publishing Company, 1899.

American Practice Reports. Official Leading Cases in all State and Federal Courts, Annotated and Systematically Arranged so as to Include in the Table of Cases of each State its Reported, Cited and Digested Practice Cases. Editor in Chief, Charles A. Ray, LL.D., Ex-chief Justice of the Supreme Court of the State of Indiana, and Author of "Imposed Duties," "Carriers," etc. Volume I. Washington Law Book Company, Law Booksellers and Publishers, Washington, D. C., 1899.

The American State Reports, Containing the Cases of Value and Authority Subsequent to Those Contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States. Selected, Reported and Annotated, By A. C. Freeman, and the Associate Editors of the "American Decisions." Vol. 64. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers, 1898.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACTION—Capacity to Sue.—Want of legal capacity to sue refers to a general legal liability. If such do not exist, the failure of a plaintiff to show a right of action in himself goes to the sufficiency of the pleading to state a cause of action, and is not waived by failure to demur for want of capacity.—STATE v. MOORES, Neb., 78 N. W. Rep. 529.

2. ADMINISTRATORS—Suits in Other States.—The domiciliary administrators of a decedent cannot be considered strangers to a suit brought in behalf of the estate in another State, as they must be accounted with for any recovery therein, though the suit should be brought by another as ancillary administrator appointed in such State, and their receipt would be a good acquittance to the defendant.—HODGES v. KIMBALL, U. S. C. C. of App., Fourth Circuit, 91 Fed. Rep. 845.

3. ADMIRALTY — Wharfingers — Injury to Vessel.—While a wharfinger does not guaranty the safety of vessels coming to his wharves, he is bound to exercise reasonable diligence in ascertaining the condition of the berths thereat, and, if there is any dangerous obstruction, to remove it, or to give due notice of it to vessels about to use the berths. At the same time, the master of such a vessel is bound to use ordinary care, and cannot run carelessly into danger.—SMITH v. BURNETT, U. S. S. C., 19 S. C. Rep. 442.

4. ASSOCIATIONS — Members — Liability.—An agreement by the members of a voluntary association to receive a person as a member, and his acceptance with the mutual understanding that he will participate in the profits and losses of the association equally with other members, constitutes him a member of the association.—BENNETT v. LATHROP, Conn., 42 Atl. Rep. 634.

5. BANKS—Cashiers.—Profits derived by a cashier of a bank from a sale of bonds negotiated by him while cashier, and in the discharge of his duties as such cashier, belong to the bank.—MT. VERNON BANK v. PORTER, Mo., 49 S. W. Rep. 982.

6. BANKS AND BANKING — Insolvency — Following Trust Fund.—A bank sent to another items for collection, which it received and collected, partly by accepting a draft of another bank, and by charging the accounts of its depositors. Such drafts, together with one of its own, were forwarded in settlement, but were not paid, as both banks made assignments. Held, that the first bank did not have a preference over general creditors of the insolvent collecting bank on account of such collections, since, as it received no money, and there was no augmentation of its assets by such collection, no trust fund was created in its favor.—MIDLAND NAT. BANK OF KANSAS CITY v. BRIGHTWELL, Mo., 49 S. W. Rep. 994.

7. BANKS AND BANKING — Liability of Directors for False Statements.—To render directors liable, in an action of deceit, for a false statement as to the condition of the bank, it must be alleged that they knew the statement to be false, and not merely that they might, by ordinary care, have known that fact.—PIERATT v. YOUNG, Ky., 49 S. W. Rep. 964.

8. BILLS AND NOTES — Notice of Non-payment.—The allegation that at the maturity of a bill payment was demanded and refused, and that plaintiff immediately caused the bill to be protested for non-payment, and notified the indorsers of the non-payment and protest, sufficiently alleges notice of non-payment, though no protest was necessary.—RUDD v. DEPOSIT BANK OF OWENSBORO, Ky., 49 S. W. Rep. 971.

9. BOND — Oral Limitation.—A general liability on a bond accompanying a mortgage given for purchase money of land may be restricted by oral agreement, at the time it is made, that it shall be collectible alone out of the property conveyed; the agreement of sale providing only for mortgage on the premises.—SCHWEYER v. WALBERT, Penn., 42 Atl. Rep. 694.

10. BONDS — Pleading — Acceptance.—A bond guarantying payment of money collected by an employee until notice from the obligor is absolute and continuous, and notice of the obligee's acceptance thereof need not be given.—TAPPER v. NEW HOME SEWING MACH. CO., Ind., 53 N. E. Rep. 202.

11. BILLS AND NOTES — Attorney's Fee.—A note providing for an attorney's fee was, after the death of the principal maker, filed as a claim against his estate, no attorney being employed for the purpose. After part payment of it by the estate, suit was commenced thereon by an attorney against the sureties, and during its pendency the maker's estate paid the balance of the principal and interest. Held, that the sureties were liable for attorney's fees incurred in bringing the suit.—SHOUP v. SNEPP, Ind., 53 N. E. Rep. 189.

12. BUILDING AND LOAN ASSOCIATIONS—Insolvent Association.—A member of an insolvent association, by giving notice of withdrawal before the execution of a deed of assignment by the association, does not acquire the right to a preference over other stockholders in the distribution of the assets.—REDDICK v. UNITED STATES BLDG. & LOAN ASSNS.' ASSIGNEE, Ky., 49 S. W. Rep. 1075.

13. BUILDING AND LOAN ASSOCIATIONS — Usury—Conflict of Laws.—In a suit to compel a Tennessee building and loan association to accept, in satisfaction of a mortgage, a sum less than demanded, there is no question of usury, in the absence of proof of the laws of Tennessee relating to such associations, the mortgage being payable in that State, and the parties having agreed that the transaction in which the mortgage was made should be governed by the laws thereof.—RIGGIN v. SOUTHERN BLDG. & LOAN ASSN., Ark., 49 S. W. Rep. 1079.

14. CARRIERS—Connecting Lines—Liabilities.—A railroad receiving freight destined to a point beyond its line is only bound, in the absence of a special contract, to safely carry over its own route, and deliver it to the next connecting carrier; but it may agree that it will assume the responsibility of its transportation the entire distance, in which case its liability will be corre-

spondingly extended. Such will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence.—HOFFMAN v. UNION PAC. RY. CO., Kan., 56 Pac. Rep. 331.

15. CARRIERS—Passenger—Contributory Negligence.—Where a passenger goes on the platform of a car in motion, and notice that the train is running at an unusual and dangerous rate of speed, an employee of the carrier who knows of his presence on the platform need not warn him of the danger.—EBERT v. GULF, ETC. RY. CO., Tex., 49 S. W. Rep. 1105.

16. CARRIERS OF PASSENGERS—Rules as to Baggage.—A rule that a baggage master shall not receive, into the baggage room, baggage until a ticket has been procured, is unreasonable and void.—COFFEE v. LOUISVILLE & N. R. CO., Miss., 25 South. Rep. 157.

17. CHATTLE MORTGAGES — Foreclosure — Sequestration.—In foreclosure, the mortgagee sequestered, replevied, and sold the property, bringing the proceeds into court, and tendering the amount as a credit on the mortgage. The mortgagor did not question the sufficiency of the amount realized, nor ask the court to adjust his rights under the replevy bond. Held that, though the mortgagee wrongfully sold the property, he having offered the proceeds in its place, the mortgagor was estopped by the judgment to afterwards sue on the replevy bond for the value of the property.—CAMERON v. HINTON, Tex., 49 S. W. Rep. 1047.

18. CHATTEL MORTGAGE — Validity.—A chattel mortgage on crops to be grown "during the continuance of a mortgage" is sufficiently definite as to the term, there being, under the decision of the court, a limit to the continuance of such a mortgage as against subsequent purchasers or incumbrancers.—HALL v. GLASS, Cal., 56 Pac. Rep. 336.

19. CONSTITUTIONAL LAW—Oleomargarine—Power of State to Regulate.—Where oleomargarine was furnished by the federal government to be served as food to the inmates of a national home for federal soldiers, the governor of such institution is not amenable to the laws of the State in which it is located, regulating the use and sale thereof, since the legislature of the State has no constitutional power to interfere with the internal management of federal institutions located within its limits.—STATE OF OHIO v. THOMAS, U. S. S. C., 19 S. C. Rep. 453.

20. CONTRACT — Medical Services.—In an action to recover for surgical and medical services rendered, where malpractice is relied upon as a defense, it is reversible error for the court to refuse to instruct the jury that, if they find as a fact the plaintiff was guilty of malpractice, he cannot recover for such services.—ABBOTT v. MAYFIELD, Kan., 56 Pac. Rep. 327.

21. CONTRACT — Patent Right—Sale of Territory.—A contract with the patentee of a gas regulator provided that "the party of the first part (the patentee) does hereby bargain and sell, assign, grant, and convey, to the party of the second part, the exclusive right to sell, rent, and use the said regulator," in certain territory. A condition subsequent gave the assignee a year from the date of the contract to cancel it, by a stipulated notice, and provided that if, at or before one year, the assignee signified his election to continue the business, the agreements of the contract were to become permanent. Held, that the first provision at once vested in the assignee the absolute right to the territory, subject, under the other provisions, to the assignee's rights of rescission within a year.—FORD v. DYER, Mo., 49 S. W. Rep. 1091.

22. CORPORATIONS—Authority of Agent.—Where the stockholders of a corporation have no meetings, and permit an agent to manage the business in every particular, he has authority to execute a conveyance of all the assets of the corporation in trust for the benefit of creditors.—CONELY v. COLLINS, Mich., 78 N. W. Rep. 555.

23. CORPORATIONS—Criminal Liability for Failure to Report.—Ky. St. § 4077, providing that certain named corporations, including railway companies, incorporated banks, and trust companies, "and every other like company, corporation, or association, also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise;" and section 4078, requiring such corporations to make reports to the auditor, showing certain facts, in such form as he may prescribe—apply only to such corporations as have some exclusive privilege or perform some public service, and not to private business corporations.—LOUISVILLE TOBACCO WAREHOUSE CO. v. COMMONWEALTH, Ky., 49 S. W. Rep. 1069.

24. CORPORATIONS—Presumption that Contract was in Writing.—Where the directors of a turnpike road company refrained for more than 20 years from exacting tolls from plaintiff, who testifies that this was done pursuant to a contract made with the directors of the company at a formal meeting, the presumption is that the records of the company, which have been lost, would, if produced, show the contract to be in writing, and therefore binding.—PIGG v. STACEY, Ky., 49 S. W. Rep. 1065.

25. CORPORATIONS — Stockholders — Payments for Stock in Property.—Property conveyed in payment of stock in a corporation, as against creditors without notice, is not a payment except to the extent of its actual value, notwithstanding the overvaluation was *bona fide* and without intent to defraud on the part of the corporation or of those receiving the stock.—COLE v. ADAMS, Tex., 49 S. W. Rep. 1052.

26. CREDITORS' BILL—Necessity of Judgment.—Under Code, § 251, providing that nothing in the act giving a remedy for reaching property of judgment debtor in the hands of another shall prevent an action in the nature of a creditors' bill, such a bill will lie though complainants have not obtained judgment against the debtor, where it is found that a judgment or execution would have been a useless and unnecessary expense.—LIVINGSTON v. SWOFFORD BROS. DRY GOODS CO., Colo., 56 Pac. Rep. 351.

27. CRIMINAL EVIDENCE—Homicide—Letters.—Letters confessing the perpetration of the murder of defendant's wife and children, found on a stand in his house, near their bodies, after the homicide, and dated on the day of the homicide, where written on defendant's letter heads, and signed with his name, and spattered with blood, and where defendant immediately fled from the State, are admissible, without proof of defendant's handwriting.—STATE v. SOPER, Mo., 49 S. W. Rep. 1007.

28. CRIMINAL LAW—False Pretenses—Venue.—An indictment for obtaining money under false pretenses, alleging a crime consisting of a series of acts committed in several counties, but constituting only one attempt, must distinguish by apt averments between the different venues, since the crime is punishable in either of the counties where not enough is done in one county to amount to a completed and punishable crime.—STATE v. FRAKER, Mo., 49 S. W. Rep. 1017.

29. CRIMINAL LAW — Homicide—Indictment.—An indictment alleging that accused, feloniously, willfully, deliberately, premeditately, and with malice aforethought, assaulted deceased, by feloniously, deliberately, premeditately, and with malice aforethought shooting her, thereby deliberately, premeditately, feloniously, willfully, and with malice aforethought inflicting a mortal wound, sufficiently charges that the killing was felonious, deliberate, and premeditated.—STATE v. BURNS, Mo., 49 S. W. Rep. 1005.

30. CRIMINAL LAW — Homicide—Instructions.—Statement in a charge that "life cannot be taken to arrest any other than a felonious assault, or an attempt to commit a felony," is not open to the objection that it authorizes self-defense only to arrest actual danger of a felonious nature, where, in other parts of the charge, the principle is announced that the danger which will

justify taking life to save life need only be apparent.—EVANS v. STATE, Ala., 25 South. Rep. 175.

31. CRIMINAL LAW—Manslaughter—Instructions.—An instruction, under Rev. St. 1889, § 3471, declaring the killing of another in a heat of passion, "without a design to effect death," to be manslaughter in the third degree, is not called for, where defendant, worsted in a quarrel of his own seeking, in which he was the manifest aggressor, rose with the exclamation, "I will fix him anyhow!" went to his house, got a revolver, returned making threats, shot toward the window from which he heard deceased promise his mother he would not fight, and, on hearing a scream, exclaimed, "I got him anyhow," and, when taken to his bed, said he was sorry he had not killed him.—STATE v. BARUTIO, Mo., 49 S. W. Rep. 1004.

32. CRIMINAL LAW—Murder—Provoking Difficulty.—Where defendant provoked the difficulty which resulted in a homicide, and could have safely retreated while peril was imminent, evidence that deceased was of violent character is inadmissible.—TEAGUE v. STATE, Ala., 25 South. Rep. 209.

33. CRIMINAL LAW—Murder—Self-defense.—It is not generally true that the right of self-defense does not imply the right of attack. One who has reasonable ground to believe that another intends to do him great bodily harm, and that such design will be accomplished, need not wait until his adversary gets advantage over him, but may immediately kill the latter, if necessary to avoid the danger.—STATE v. MATTHEWS, Mo., 49 S. W. Rep. 1085.

34. CRIMINAL PRACTICE—Forgery—Indictment.—Under Rev. St. 1889, § 3635 (providing that every person having possession of any forged check, with intent to utter, pass, or sell the same as true, shall, on conviction, be adjudged guilty of forgery), an indictment alleging that defendant unlawfully had in his possession a certain false, forged, and counterfeit check purporting to be made and drawn on parties named, with intent to utter, pass, or sell the check as true to persons named, defendant well knowing such check to be false, forged, and fraudulent, is sufficient.—STATE v. TURNER, Mo., 49 S. W. Rep. 988.

35. DAMAGES FOR PERSONAL INJURIES—Pleading and Proof.—In an action for personal injuries, the fact that plaintiff's intended marriage had to be postponed on account of the injuries cannot be proved under a general allegation of mental suffering, since it was not a necessary consequence of the injury.—BEATH v. RAPID RY. CO., Mich., 78 N. W. Rep. 537.

36. DEATH BY WRONGFUL ACT—Jurisdiction of Courts.—A right of action against a railroad company to recover damages for the death of an employee, given by a statute of the State in which the injury occurred and the contract of employment was made, may be enforced in another State, in a court having jurisdiction of the subject-matter and of the parties, where it is not contrary to the policy of such State.—LAW v. WESTERN RY. OF ALABAMA, U. S. C. C., N. D. (Ga.), 91 Fed. Rep. 817.

37. DEED—Acknowledgment—Interested Officer.—An acknowledgment of a mortgage to one of two co-executors, as such, before a master who was the co-executor, is valid, where the mortgage on its face does not disclose his interest therein, since the taking of an acknowledgment is a ministerial act.—MORROW v. COLE, N. J., 42 Atl. Rep. 673.

38. DEEDS—Provision against Alienation.—Civ. Code Prac. § 490, subsec. 2, authorizing a vested estate in real property jointly owned by two or more persons to be sold by order of a court of equity when the property cannot be divided, does not authorize the court to disregard a provision of the deed under which the property is held, forbidding a sale of the property until the youngest grantee "shall arrive at maturity."—YOUNG v. YOUNG, Ky., 49 S. W. Rep. 1074.

39. DITCHES—Drains—Construction in Several Counties.—A petition for the construction of a ditch having its source in K county and its terminus in M county, and for an arm having its source in J county and its terminus in M county, filed with the auditor of K county, which county contained the head and source of the proposed ditch, as required by Burns' Rev. St. 1894, § 5677, was properly dismissed so far as it related to the construction of the arm along its source in J county.—BONDURANT v. ARMEY, Ind., 53 N. E. Rep. 169.

40. EQUITABLE CONVERSION—Wills.—Personal property not specifically bequeathed was required for the payment of debts. By the terms of the will certain real estate not specifically devised became the property of the residuary devisees. The executor was directed to convert it into money as fast as sales could be profitably effected. Held to constitute an equitable conversion into personalty in favor of any whose interests under the will could not otherwise be secured.—DUFFIELD v. PIKE, Conn., 42 Atl. Rep. 641.

41. EQUITABLE MORTGAGES—Vendor and Purchaser.—One H, the purchaser in a land contract, made an agreement with plaintiff which provided that, if plaintiff should buy the property by virtue of the land contract, he would resell to H at an advanced price, which H agreed to pay. Held, the property having been bought by plaintiff with his own money, and as such, that the agreement did not constitute H an equitable owner of the premises and plaintiff an equitable mortgagee.—SPAULDING v. JENNINGS, Mass., 53 N. E. Rep. 204.

42. EVIDENCE—Parol Testimony to Explain Contract.—As the ambiguity was latent, parol testimony was admissible, under proper allegations, to show that an agreement to assume the liabilities of a corporation as shown by its "books" was intended to designate certain books of account.—KENTUCKY CITIZENS' BUILDING & LOAN ASSN. v. LAWRENCE, Ky., 49 S. W. Rep. 1059.

43. EXECUTION—Claims of Third Persons.—The claim of the third opponent was not liquidated, and he was prevented by its amount from going before a justice of the peace court to assert the claim and the privilege by which it was secured against another creditor, who was having judgment rendered in his favor by a justice of the peace court, executed to satisfy the privilege recognized by the judgment on the property to which opponent also claimed a privilege. Held, that the third opponent can compel his adversary to come into the district court to litigate his right to a privilege.—BROWN v. WASHINGTON, La., 25 South. Rep. 102.

44. EXECUTION SALE — Purchase by Judgment Creditor.—A judgment creditor purchasing in good faith at a proper execution sale on his own valid judgment is a *bona fide* purchaser for value, and takes free from secret equities.—PUGH v. HIGHLEY, Ind., 53 N. E. Rep. 171.

45. FEDERAL COURTS — Jurisdiction — Citizenship.—Where jurisdiction of the circuit court originally depended on diversity of citizenship, Act Aug. 13, 1888, making the decree of the circuit court of appeals final in such cases, applies, and prevents an appeal to the supreme court, though another ground of jurisdiction, under which such appeal might be taken, is developed in the course of the proceedings.—THIRD STREET & SUBURBAN RY. CO. v. LEWIS, U. S. S. C., 19 S. C. Rep. 451.

46. FEDERAL COURTS — Jurisdiction — Federal Question.—Where a creditor brought suit in attachment against a corporation in a federal court, which subsequently ordered the property seized surrendered to a receiver previously appointed therefor by a State court, unless application for its retention was made to such State court within five days, which the creditor failed to make, but brought suit to nullify the appointment of the receiver, and for damages, under a State statute, which was decided adversely to him by the supreme court of the State, there is no federal question presented by a writ of error to the United States Supreme Court from such decision, and the writ will therefore be dismissed.—REMINGTON PAPER CO. v. WATSON, U. S. S. C., 19 S. C. Rep. 456.

47. FEDERAL OFFENSE — Power of Congress to Regulate Use of Mails.—The constitutional power of congress to establish post offices and post roads embraces

the regulation of the entire postal system, and includes as a necessary incident the right to determine what may be carried in the mails, and what shall not be, and to impose penalties for the violation of its regulations to be enforced, through the courts, such as are contained in Rev. St. § 5480.—UNITED STATES v. LORING, U. S. D. C., N. D. (Ill.), 91 Fed. Rep. 881.

48. FIXTURES—Evidence — Declarations of Predecessors.—Where chattels are claimed by the grantee of lands as fixtures, as against one claiming them under a chattel mortgage from a third person, the death of the grantee does not disqualify the mortgagee from testifying to the declarations of the grantor of the lands in reference to her ownership of the chattels at the time the chattel mortgage was given, where her estate is not interested in the result of the suit.—NELSON v. HOWISON, Ala., 25 South. Rep. 211.

49. FRAUDS, STATUTE OF.—Partners engaged in selling mortgages in their possession bearing an indorsement in blank of the mortgagee, a corporation of which one of the partners is president, are ostensibly the owners, so that their oral guaranty thereof to a purchaser is not within the statute of frauds.—CRAWFORD v. PYLE, Penn., 42 Atl. Rep. 687.

50. FRAUDULENT CONVEYANCES—Consideration.—Under Sayles' Civ. St. art. 2544, upholding transfers for value though in fraud of creditors, unless the purchaser had notice of the fraudulent intent, an instruction that, if his only purpose in taking the transfer was to collect his debt, it was valid, though the debtor intended to defraud other creditors, was faulty, as omitting to charge that the purchaser must have no notice of the debtor's intent.—KOCH v. BRUCE, Tex., 49 S. W. Rep. 1101.

51. FRAUDULENT CONVEYANCES — Improvements.—In an action to set aside a fraudulent conveyance the grantee cannot, on appeal, object to the court's failure to declare improvements made by her since the execution of the deed to be clear from plaintiff's lien, where she presented no issue on the subject, offered no testimony about it, and made no request for any finding concerning it.—ROSE v. DUNKLER, Colo., 56 Pac. Rep. 342.

52. FRAUDULENT CONVEYANCES—Insolvent Debtor.—Where an insolvent transferred all his property to a creditor who had knowledge of his insolvency, in payment of the debt, which the value of the property largely exceeded, the transfer is fraudulent as to creditors.—HALFF v. GOLDFRANK, Tex., 49 S. W. Rep. 1095.

53. FRAUDULENT CONVEYANCES — Pleading — Sufficiency.—A bill by a judgment creditor to set aside a conveyance of his debtor sufficiently sets out facts constituting fraud by alleging that the conveyance was voluntary, and rendered the debtor without means to pay his debts.—DUNKLEE v. ROSE, Colo., 56 Pac. Rep. 348.

54. FRAUDULENT CONVEYANCES — Purchase from Trustee.—Where goods conveyed to a trustee to pay preferred debts were repurchased by a third person confederating with the debtor, partly with the debtor's money, partly with a fictitious claim of his own, and partly with valid claims, the transaction was fraudulent as to creditors, and invalid.—LEVINE v. ROUSS, Tex., 49 S. W. Rep. 1051.

55. FRAUDULENT CONVEYANCES—Rights of Creditors.—The sales of record evidence an intention to prevent and hinder the creditor from collecting, and to place the property beyond the reach of his creditors, in violation of article 240 of the Code of Practice.—APPLEBY v. LEHMAN, La., 25 South. Rep. 132.

56. GARNISHMENT—Orders for Money.—Before acceptance of an order, the drawee is not indebted to the payee, so as to be subject to garnishment in a suit against the latter.—STONE v. DOWLING, Mich., 78 N. W. Rep. 549.

57. HABEAS CORPUS—Criminal Law—Judge De Facto.—A person who has been convicted and sentenced for a crime by a judge *de facto*, acting under color of office, and who is detained in custody under such sentence, cannot be discharged on *habeas corpus*, though the judge had no valid title to the office.—EX PARTE WARD, U. S. S. C., 19 S. C. Rep. 459.

58. HIGHWAYS—Obstruction—Prescription.—Where a charge told the jury that 20 years' user by the public, to constitute a highway by prescription, must not be as "matter of favor" from the landowner, but as "matter of right" in the public, and in several places stated that the user must be adverse and under claim of right, a party cannot complain that isolated expressions therein seem to convey the idea that mere user would constitute prescription, though the road ran over unenclosed woodland.—STATE v. TYLER, S. Car., 32 S. E. Rep. 422.

59. HOMESTEAD — Deeds—Acknowledgment.—A deed purporting to convey the fee of a homestead, in the granting clause whereof the wife joined, was not absolutely void because the certificate of acknowledgment failed to show that the wife acknowledged the execution of the deed, as well as the relinquishment of dower therein; and hence it was cured by Act March 11, 1891, providing that "all conveyances proof of execution whereof is insufficient because the officer certifying such execution omitted any words in his certificate or is otherwise informal, shall be as valid and binding as though the certificate of acknowledgment or proof of execution was in due form."—WILLIAMSON v. LAZARUS, Ark., 49 S. W. Rep. 974.

60. HOMESTEAD—Husband and Wife.—A husband and wife deeded an undivided half of their homestead to their son, and a contract was executed providing for conveyance of the other half to him at their death, conditioned on his supporting them, but the wife failed to sign the contract. Held, that her execution of the deed was not, as to the other half of the homestead, a sufficient compliance with Const. art. 16, § 2, and How. Ann. St. § 7722, avoiding a conveyance of a homestead in which the wife does not join.—WEBSTER v. WARNER, Mich., 78 N. W. Rep. 552.

61. HUSBAND AND WIFE—Compensation of Husband.—For the benefit of his creditors, the husband is entitled to the reasonable value of his services for attending to the business of the wife, who was empowered to trade as a *feme sole*, and not merely to the amount which the wife agreed to pay him therefor, that being a matter as to which they may not contract.—SMITH v. MEISENHEIMER, Ky., 49 S. W. Rep. 968.

62. HUSBAND AND WIFE — Resulting Trust.—Where a husband purchases land, and has it conveyed to his wife, and the deed does not intimate that it was intended to be held in trust for him, it is presumed *prima facie* a provision for her.—CURD v. BROWN, Mo., 49 S. W. Rep. 990.

63. HUSBAND AND WIFE—Separate Estate.—Under the married woman's act of 1889 (Rev. St. 1889, § 6869), making land purchased in the name of the wife, with her separate money, her separate estate, and the income, increase, and profits thereof are hers, the husband's curtesy initiate does entitle him to the rents and profits during coverture.—WOODWARD v. WOODWARD, Mo., 49 S. W. Rep. 1001.

64. INJUNCTION—Repairing Sidewalks—Ordinances.—Injunction lies to enjoin the issue of a special tax bill against premises to pay for street improvements, on the ground that the ordinance providing therefor is unreasonable and oppressive, notwithstanding any such right to urge such facts as a defense to an action on the tax bill.—SKINKER v. HEMAN, Mo., 49 S. W. Rep. 1026.

65. INSURANCE POLICY — Assignment of Proceeds.—Where a debtor assigned to a creditor his insurance under a fire policy, in trust to pay his debt, and to hold the balance subject to his order, orders made in good faith and for value are binding, though they are not accepted, and are countermanded before the insurance is received.—MCGAHAN v. LOCKETT, S. Car., 32 S. E. Rep. 429.

66. JUDICIAL SALES—Redemption.—A debtor will be allowed to complete the redemption of his land from a commissioner's sale after the expiration of the time allowed therefor, where he attempted in good faith to redeem it in due time, but by mistake deposited a few dollars less than the amount due.—MOORE v. BISHOP, Ky., 49 S. W. Rep. 957.

67. LANDLORD AND TENANT — Evidence. — An agreement provided that the owner of the land should have a lien for advances, and the cropper should keep the place in repair, clear out the bottom ditches, clear off all river and ditch banks of brush, and give up possession after a certain date. Held, that the relation of landlord and tenant existed.—RAKESTRAW v. FLOYD, S. Car., 32 S. E. Rep. 419.

68. LANDLORD AND TENANT—Notice to Quit.—Premises were conveyed by trust deed as security for several creditors, and the trustee, at their and at the owner's request, permitted one of the creditors to go into possession. Held, that the relation of landlord and tenant existed between such creditor and trustee.—CANDLER v. MITCHELL, Mich., 78 N. W. Rep. 551.

69. LEASE — Covenant for Improvments. — Where a lease of premises contains a covenant binding the lessor to make certain improvements, and he refuses, after notice from the lessee, to make such improvements, the lessee may make the same, and charge the reasonable value thereof against the rent.—BEARDSLEY v. MORRISON, Utah, 56 Pac. Rep. 363.

70. LIFE INSURANCE — Default in Premiums.—A life policy provided that after three years, on default in payment of premiums, without surrender, it should become a paid-up term policy, if all notes given for premiums had been paid at maturity. Non-payment of premium notes was to avoid it, and three years from its date it was to be incontestable except for certain causes, among which was the non-payment of premium notes. Held, that on default in the payment of a premium the policy did not become a paid-up term policy if at the time a past-due premium note was unpaid.—UNION CENT. LIFE INS. CO. v. WILKES, Tex., 49 S. W. Rep. 1038.

71. LIFEI NSURANCE — Non-payment of Premium — Waiver.—A life insurance agent may waive a forfeiture for non-payment of a premium when due, though the policy expressly states that no waiver shall be valid unless in writing, signed by an officer of the company.—JAMES v. MUTUAL RESERVE FUND LIFE ASSN., Mo., 49 S. W. Rep. 978.

72. MALICIOUS PROSECUTION—Probable Cause —Two country merchants, engaged in business in the same vicinity, having both furnished plantation supplies to a customer who made an insufficiency of cotton to pay their accounts, and one of them, having obtained possession thereof by purchase, in an honest competition, was caused to be arrested by the other on a charge of robbery, and to be incarcerated in jail, and there detained for several days, being fully aware of all the circumsfances, held, that the proceeding was taken without probable cause, and with malice inferable from the act, and the affiant is liable in damages to the party thus arrested, as having been guilty of a malicious prosecution.—GANN v. VARNADO, La., 25 South. Rep. 79.

73. MANDAMUS TO RAILROAD — Establishment of Depot.—A railroad company cannot be forced by *mandamus* to establish a depot at a particular place, in the absence of a duty having been imposed upon it so to do, either by general laws, or by special requirement in its charter.—STATE v. KANSAS CITY, S. & G. RY. CO., La., 25 South. Rep. 126.

74. MASTER AND SERVANT—Wrongful Discharge.— A request, in an action for breach of contract of employment, that, if the servant refused to obey rules of the masters, they had a right to discharge him, was properly modified so as to condition such right on the servant having notice of the rules.—HAMILTON v. LOVE, nd., 53 N. E. Rep. 181.

75. MINING CLAIM ALIEN—Transfer to Citizen.—Where a mining claim is located by an alien on unappropriated government land, and all the acts necessary to a valid location are performed by him, and he and his representatives, claiming to be the owners thereof, perform the work necessary to keep the claim good until it is conveyed to a citizen, and no rights of third parties have attached prior to the conveyance, as between private citizens, in which the government is not interested, the conveyance vests the title in the citizen, although the original locator was an alien.—WILSON v. TRIUMPH CONSOL. MIN. CO., Utah, 56 Pac. Rep. 300.

76. MINING LEASE—Assignment.—The assignee of a mining lease, who was to work the claim, and to pay therefor the net proceeds up to a certain sum, failed to realize profits, and permitted another to work the mine with the same understanding, but he also failed to realize profits. The assignment did not forbid subletting, nor require continuous working. Held, that assignee's letting another work the mine was not a putting it out of his power to comply with his contract, so as to make him liable as if he had carried it out.—CALEY v. PORTLAND, Colo., 56 Pac. Rep. 350.

77. MORTGAGES—Assumption of Debt.—The assumption of a mortgage debt by a grantee constitutes him the principal debtor, and the mortgagor his surety, so that an extension by the mortgagee without consent of the mortgagor releases him.—PRATT v. CONWAY, Mo., 49 S. W. Rep. 1028.

78. MORTGAGES—Parol Contracts.—Though a verbal agreement between mortgagee and mortgagor, whereby the former is to take possession until his debt is paid from the rents, and then restore it to the latter, cannot be specifically enforced in an action by mortgagor for an accounting of the rents, and to redeem from a foreclosure and purchase by the mortgagee, it may be relied on as an equitable estoppel against the assertion of title by the mortgagee, and against his right to plead limitation.—HIGGINS v. HABERSTRAW, Miss., 25 South. Rep. 168.

79. MORTGAGE FORCLOSURE — Sale.—Where a mortgagor conveys a portion of the mortgaged premises by warranty containing no reference to the mortgage, that part of the premises retained by him is primarily liable for the entire mortgage debt, and must be sold before the portion conveyed can be resorted to, even though the consideration of the conveyance was one dollar and love and affection.—HOWSER v. CRUIKSHANK, Ala., 25 South. Rep. 206.

80. MUNICIPAL CORPORATIONS — Contracts — Right of Contractor to Rescind.—The trustees of the sanitary district of Chicago as representatives of a municipal corporation required by law to let contracts for public work to the lowest bidder after advertisement, are not bound to exercise diligence to obtain information concerning the nature or cost of the work for the benefit of the bidders, with whom they deal at arm's length, their sole duty in that regard being to the corporation; and a contractor for the excavation of a section of the drainage canal is not entitled to a rescission of his contract because he encountered a substance more difficult and expensive to excavate than anything he was led to expect from an examination of the profile and *data* in the office of the chief engineer,—no intentional fraud being charged against the trustees or engineer,—nor because some of the trustees knew, or should have known, of the existence of further information on the subject of which they did not inform the contractor.—SANITARY DIST. OF CHICAGO v. RICKER, U. S. C. C. of App., Seventh Circuit, 91 Fed. Rep. 833.

81. MUNICIPAL CORPORATIONS—Ordinance—License of Vehicles.—Under a city charter providing that "a vehicle license may be imposed in addition to a business license, provided that such license shall only apply to vehicles used in the transportation of goods, wares, and merchandise, and vehicles used for hire at the public stands," an ordinance was authorized imposing

a license on "drays, wagons, and vehicles used in the transportation of goods and merchandise, and vehicles used for hire at the public stands."—BROWNE v. CITY OF MOBILE, Ala., 25 South. Rep. 228.

82. MUNICIPAL CORPORATIONS—Passage of Ordinance.—Under a city charter providing that no ordinance for any original improvement "shall pass both boards of the general council at the same meeting, and at least two weeks shall elapse between the passage of any such ordinance from one board to the other," an ordinance which passed the lower board on April 5th, and the upper board April 19th, is valid.—GLEASON v. BARNETT, Ky., 49 S. W. Rep. 1060.

83. MUNICIPAL CORPORATIONS—Title to Office.—A city charter created a board, to be appointed by the mayor, who was to be an *ex officio* member, and authorized to preside at all meetings at which he should be present. The board was authorized to elect a street commissioner. At a meeting of the board, the mayor, being present, declined to entertain a motion to take a ballot for such commissioner; holding that the motion was out of order. Thereupon a member put the motion, and a ballot was taken by rising vote, resulting in a majority for a certain person. Held, that, under the charter, such action was void, and the election invalid.—STATE v. LASHER, Conn., 42 Atl. Rep. 636.

84. NEGLIGENCE — Injury to Infant—Imputed Negligence.—In an action to recover for injuries received while a minor, the negligence of the parent cannot be imputed to the plaintiff.—CITY OF JEFFERSONVILLE v. MCHENRY, Ind., 53 N. E. Rep. 183.

85. NUISANCES—Right to Enjoin.—Hill's Ann. Laws, § 383, providing a remedy at law for a private nuisance by an action for damages and an order to abate the nuisance, is not exclusive, where immediate relief is demanded, since section 380 provides that the enforcement or protection of a private right, or the prevention of, or redress for, an injury thereto, shall be obtained by a suit in equity in all cases where there is not a plain, adequate, and complete remedy at law.—BLAGEN v. SMITH, Oreg., 56 Pac. Rep. 292.

86. PARTNERSHIP — Accounting. — By a contract between two partners running a theater, one was to act as treasurer, or furnish one. On leasing another theater, they agreed that the duties imposed on each with regard to it were to be the same as in the first contract. Held, that the partner failing to act as treasurer of the last theater, or to furnish one, was properly charged with the treasurer's salary in an accounting between the partners.—PARSONS v. JENNINGS, Conn., 42 Atl. Rep. 630.

87. PLEDGEE AS BONA FIDE PURCHASER.—A wife directed her husband to purchase shares with moneys belonging to her separate estate; and without her knowledge he had the certificate issued in his name, and assigned it to a person having no notice that it had been purchased with funds of the wife, as collateral for a loan to himself. Held, that the pledge was valid against the wife.—ANDERSON v. WACO STATE BANK, Tex., 49 S. W. Rep. 1030.

88. PARTNERSHIP — Compensation of Surviving Partner.—A surviving partner was not entitled to compensation for his services in winding up the partnership business, or chargeable with interest on the amount found to be due on settlement.—COAKLEY v. HAZELWOOD'S EXR., Ky., 49 S. W. Rep. 1067.

89. PROHIBITION.—Though the transfer of an action at law for the recovery of money to the chancery court, on the ground that the trial would involve a long examination of voluminous and intricate accounts, was erroneous, the chancery court will not be prohibited from proceeding with it, where no irreparable loss is threatened, since there is an adequate remedy by appeal.—WEAVER v. LEATHERMAN, Ark., 49 S. W. Rep. 977.

90. PROHIBITION — Right to Writ.—As a writ of prohibition does not lie to restrain an inferior court from deciding erroneously, the fact that a justice of the peace is about to declare to be valid an act which is unconstitutional does not authorize a writ of prohibition against him, where he has jurisdiction independent of the act in question.—SCOTT v. TULLY, Ky., 49 S. W. Rep. 1063.

91. QUO WARRANTO — Application.—How. Ann. St. § 8662, provides that an information in the nature of *quo warranto* may be filed in the circuit court, and that all powers conferred on the judges of the supreme court in regard thereto are conferred on the circuit judges, provided that no such information shall be allowed by the circuit court against any State officer; also, that the information may be field by the prosecuting attorney of the property county, on his own relation, or that of any citizen of the county, without leave of court. Held that, where the dispute is over a county office, an application to have an information filed should be made to the prosecuting attorney, and not to the attorney-general.—POUND v. OREN, Mich., 78 N. W. Rep. 541.

92. RAILROAD COMPANY — Contracts — Agency.—An averment that plaintiff contracted with a railway company for the transportation of the corpse of his infant is not supported by proof that he furnished the money to another, who acted as his agent in purchasing the tickets, where neither the agency nor the fact that the agent was using plaintiff's money is disclosed to the company.—LUCAS v. SOUTHERN RY. CO., Ala., 25 South. Rep. 219.

93. RAILROAD COMPANY—Crossings — Establishment.—Where the construction of a crossing under a railroad would require the removal of a fill and construction of a bridge for the tracks, the crossing is at grade unless the petition ask for an undercrossing, and the order establishing the crossing provide therefor; and hence, in the absence of such request, it is error to charge that the jury, in determining the utility of a proposed change of location of a crossing, may consider the feasibility of making an undercrossing, that it cannot be judicially determined just what kind of crossing will be put in, but that it will be presumed that it will be done in a proper manner.—ANDERSON v. JOHNSON, Ind., 53 N. E. Rep. 168.

94. RAILROAD COMPANY—Delay in Shipping Cattle.—A railroad company in partnership with another company may be sued with the latter for delay in transporting cattle, in a county in which the latter operates its road, though the former does not operate a road in such county, nor have an agent there.—SAN ANTONIO, ETC. RY. CO. v. GRAVES, Tex., 49 S. W. Rep. 1103.

95. RAILROAD COMPANY — Killing Stock—Damages.—The fact that the owner is a dairyman cannot be considered in assessing damages against a railroad for killing cows, no recovery being sought for loss to the business.—PARRIN v. MONTANA CENT. RY. CO., Mont., 56 Pac. Rep. 315.

96. RAILROAD COMPANY — Street Railroads — Negligence.—A plaintiff, driving at night in the direction of an approaching street car, which he can plainly see, is negligent in undertaking to cross the track when the car is so close that it strikes his horse before it is off the track.—CITIZENS' ST. R. CO. v. HELVIE, Ind., 53 N. E. Rep. 191.

97. RAILROAD COMPANY—Street Railways — Contributory Negligence.—The authorities are numerous and uniform to the effect that a person whose business or pleasure occasions him to use the streets of a city which are traversed by electric cars, and particularly at street crossings, is guilty of negligence if he fails to employ proper precautions for his safety.—DIECK v. NEW ORLEANS CITY & LAKE R. CO., La., 25 South. Rep. 71.

98. RAILROAD COMPANY — Trespasser — Ejection.—A company is liable if a conductor ejects a person from a car improperly, while the train is in motion.—YOUNG v. TEXAS & P. RY. CO., La., 25 South. Rep. 69.

99. RECEIVERS—Appointment.—A creditor of a corporation dissolved on a proper petition by the stock-

holders, who has not made himself a party to the record, except by a petition for an order to compel the payment of his debt, cannot appeal from the order appointing a receiver.—RODEN V. JASPER TOWN & LANDS, Ala., 25 South. Rep. 198.

100. RECEIVERS—Appointment without Notice.—The mere allegation in a bill that complainant is in great danger of suffering irremediable damage unless the assets in defendant assignee's hands be turned over to a receiver is insufficient to warrant the appointment of a receiver without notice to defendant, where it is not even intimated in the bill that defendant, as an assignee for the benefit of creditors, has been guilty of any misconduct or fraud in the administration of the trust, or is incapable of administering it, or that he is insolvent, or that there is a just and probable cause to apprehend waste or loss.—POLLARD V. SOUTHERN FERTILIZER CO., Ala., 25 South. Rep. 169.

101. REPLEVIN—Dismissal—Jury Trial.—In an action of replevin, wherein the property has been taken under the writ and delivered to the plaintiff, if the defendant, on motion for such purpose, secures a declaration of the non-jurisdiction of the court over the subject-matter of the suit, and a dismissal thereof for that reason, he is not entitled, by virtue of the provisions of sections 190, or 1041 of the Code of Civil Procedure or otherwise to have a jury impaneled to inquire of his rights of property and possession.—STATE V. LETTON, Neb., 78 N. W. Rep. 533.

102. REPLEVIN—Liability on Forthcoming Bond.—In replevin for property wrongfully withheld, when defendant gives a forthcoming bond, plaintiff is entitled to judgment on the bond, on recovering against the principal, though, without the fault of the sureties, the property is partially destroyed by fire after the execution of the bond; and the tender of such partially destroyed property will not release them.—HAZLETT V. WITHERSPOON, Miss., 25 South. Rep. 150.

103. REPLEVIN—Property not in Possession of Defendant.—Replevin does not lie to recover property not in defendant's possession at the time of bringing the suit.—MYRICK V. NAT. CASH REGISTER CO., Miss., 25 South. Rep. 155.

104. SALE—Conditional Sale—Parol Evidence.—Parol evidence cannot be introduced in a court of law to show that an instrument on its face a conditional sale of personal property was in fact intended as a mortgage.—BATES V. CROWELL, Ala., 25 South. Rep. 217.

105. SALE—Conditional Sales.—An agreement to sell provided that on the payment of the price, or the execution of a mortgage, the seller was to execute a bill of sale, in the meantime title to remain in him, and on default in any payment he had the right of recaption. Held, that the sale was a conditional one, and this though the promise to pay was absolute, and notes for the price were given.—VAN ALLEN V. FRANCIS, Cal., 56 Pac. Rep. 339.

106. SALE—Conditional Sales—Election of Remedies.—A vendor of goods reserving title until price is paid does not, by bringing *assumpsit* for the price, elect his remedy, so as to bar replevin of the goods.—CANADIAN TYPOGRAPH CO. V. MACGURN, Mich., 78 N. W. Rep. 542.

107. SALES—Rescission by Seller.—The seller need not, as a condition precedent to a rescission, return to the buyer negotiable paper given by the latter for the price, where it is overdue, and still in the seller's possession.—SKINNER V. MICH. HOOP CO., Mich., 78 N. W. Rep. 547.

108. SUNDAY EMPLOYMENT—Contract.—A contract of employment of a musician in Boston, to appear at a park in Lowell the "week of June 28," contained in a letter, the postscript of which is, "Train leaves at 1 p. m. Sunday," does not necessarily call for services to be rendered on Sunday.—GODDARD V. MORRISSEY, Mass., 53 N. E. Rep. 207.

109. TAXATION—Assessment — Validity. — An assessment for city taxes for one year, which described the property merely as personal property, was approved without objection, and the tax was extended and paid. Subsequently the assessor, acting under a city ordinance, made a back assessment, taking as a basis therefor the valuation for the previous year for State and county taxes. Held, that such back assessment was void for not showing on its face the specific property omitted from the former assessment.—CITY OF CAPE GIRARDEAU V. BUEHRMANN, Mo., 49 S. W. Rep. 985.

110. TRIAL—Exceptions to Charge.—Exceptions to the charge of a court must be sufficiently specific to call the court's attention to the objectionable matter, so that any inadvertence may be corrected; and an exception "to that part of the charge containing plaintiff's request numbered 2," where the part referred to contains a page of printed matter, stating a number of propositions, is not sufficiently specific.—SCOTT V. UTAH CONSOL. MIN. & MILL. CO., Utah, 56 Pac. Rep. 305.

111. TRUST—Public Charitable Trusts—Validity.—A will devised the testator's real estate to his executors in trust, the rentals and proceeds when sold to be used "in establishing and maintaining free schools or school" in a town named. It provided that such schools should be public, and at all times open to children of the school district, which should embrace the town. It declared that it was the testator's intention to establish a permanent and perpetual educational fund, but not to direct the particular branches to be taught; and such matter, as well as the number, character, and cost of the buildings to be erected, was left to the judgment of the trustees. Held, that the objects and beneficiaries of the charity were specified with sufficient certainty to uphold the trust; the matters left to the discretion of the trustees being merely those of detail, relating to its execution, and which it was impracticable to provide for in the will.—JOHN V. SMITH, U. S. C. C., D. (Oreg.), 91 Fed. Rep. 827.

112. TRUST—Resulting Trusts.—A trust resulting from the payment of the purchase money for land by one person and the taking of title in another person may be established by parol evidence.—GALBRAITH V. GALBRAITH, Penn., 42 Atl. Rep. 683.

113. WILLS—Construction.—A widow to whom was devised real estate during her life, or so long as she should remain a widow, with authority, if she could not maintain herself from it, "to sell the same, and use the proceeds for her support," can convey a title in fee, at her option.—YETZER V. BRISSE, Penn., 42 Atl. Rep. 677.

114. WILLS—Construction as to Compensation of Executrix.—Where testator devised his estate after payment of debts to his niece, as trustee of his infant children, of whom she was to have the custody and control, directing her, out of the income, to support and educate the children, and to support herself, and appointed her as guardian and executrix, she is entitled to the usual commissions as executrix in addition to the support provided by the will.—THOME V. ALLEN, Ky., 49 S. W. Rep. 1068.

115. WILLS—Residuary Clause—Construction.—Where testator, after disposing of certain property, devises to his son "all the residue of my real estate and personal property not hereinbefore enumerated as hereinafter described," and specifically describes the property which he so devises, such son cannot take as residuary legatee any lapsed legacies or property not specifically disposed of, since the devise to him is restricted to the property described.—WILLIAMS V. MCKEAND, Mich., 78 N. W. Rep. 553.

116. WITNESSES—Leading Questions—Robbery.—In a prosecution for robbery, the refusal to exclude as leading a question whether prosecutrix is positive that accused is the person who seized her by the throat and wrenched her pocketbook from her, is not an abuse of discretion, where she has already identified him as the man who choked her and wrenched her pocketbook.—STATE V. WHALEN, Mo., 49 S. W. Rep. 989.